Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

October Term, 1996

DR. FRANK A. UBEL, M.D.,
and DR. HOWARD ANDERSEN, M.D.,
each individually and as members
of a class of persons similarly situated,

Petitioners,

v.

STATE OF MINNESOTA,
MINNESOTA BOARD OF MEDICAL PRACTICE and
MINNESOTA DEPARTMENT OF HUMAN SERVICES,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When a state legislature's purpose in imposing a retroactive new tax on a select group of taxpayers is to meet federal funding eligibility requirements, does such purpose override the Fourteenth Amendment due process objections to the levy of retroactive, new taxes as set forth in United States v. Carlton, 512 U.S. 26, 114 S.Ct. 2018, 129 L.Ed.2d 22 (1994), Untermyer v. Anderson, 276 U.S. 440, 48 S.Ct. 353, 72 L.Ed. 645 (1928) and Blodgett v. Holden, 275 U.S. 142, 48 S.Ct. 105, 72 L.Ed. 206 (1927)?

2. Whether a state legislature may, in accord with the equal protection guarantee of the Fourteenth Amendment to the United States Constitution, lawfully select approximately one-half of the state's licensed physicians and by the accident of their birth date require them to pay a retroactive new tax not otherwise imposed on the other one-half of the state's physicians or upon any other citizen of the state.

3. Whether the Minnesota Supreme Court denied due process of law to Petitioners when it affirmed the levy of a tax on Petitioners despite a finding by a majority and plurality of the Minnesota Supreme Court that the Minnesota Legislature had not by any valid enactment levied the tax on Petitioners.

LIST OF PARTIES

The parties to the proceedings below and before this Court are the Petitioners Dr. Frank A. Ubel, M.D. and Dr. Howard Andersen, M.D., each individually and as members of a certified class of all physicians whose licenses to practice medicine in Minnesota were issued or renewed between April 1, 1992 and September 30, 1992, and who were assessed and paid a license surcharge under Minn. Stat. § 147.01, subd. 6 (1992). The Respondents below and before this Court are the State of Minnesota, the Minnesota Board of Medical Practice and the Minnesota Department of Human Services.

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The Petitioners, Dr. Frank A. Ubel, M.D. and Dr. Howard Andersen, M.D., each individually and as members of a class of persons similarly situated, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Minnesota Supreme Court entered in the above-entitled proceeding on May 9, 1996. Petitioners' timely-filed petition for rehearing was denied on July 29, 1996.

OPINIONS BELOW

The opinion of the Minnesota Supreme Court is reported at 547 N.W.2d 366 (Minn. 1996) and is reprinted in the appendix hereto, p. A-1, infra. The opinion of the Minnesota Court of Appeals has not been reported. It is reprinted in the appendix hereto, p. A-23, infra. The memorandum decision of the Hennepin County District Court (Ginsberg, J.) has not been reported. It is reprinted in the appendix hereto, p. A-28, infra.

JURISDICTION

The opinion of the Minnesota Supreme Court was filed on May 9, 1996. A petition for rehearing was timely sought with the Minnesota Supreme Court, which rehearing was denied on July 29, 1996. This petition was filed within ninety (90) days of the denial of the petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Constitutional Provision, Fourteenth Amendment, Section 1 of the United States Constitution:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

1992 Minnesota Statute.

The Minnesota statute subdivision in question, Minn. Stat. § 147.01, subd. 6 (1992), as enacted, is set out below in its entirety:

> Subd. 6. License surcharge. In addition to any fee established under section 214.06, the board shall assess an annual license surcharge of $400 against each physician licensed under this chapter as follows:
>
> (1) a physician whose license is issued or renewed between April 1 and September 30 shall be billed on or before November 15, and the physician must pay the surcharge by December 15; and

(2) a physician whose license is issued or renewed between October 1 and March 31 shall be billed on or before May 15, and the physician must pay the surcharge by June 15.

The board shall provide that the surcharge payment must be remitted to the commissioner of human services to be deposited in the general fund under section 256.9656. The board shall not renew the license of a physician who has not paid the surcharge required under this section. The board shall promptly provide to the commissioner of human services upon request information available to the board and specifically required by the commissioner to operate the provider surcharge program. The board shall limit the surcharge to physicians residing in Minnesota and the states contiguous to Minnesota upon notification from the commissioner of human services that the federal government has approved a waiver to allow the surcharge to be applied in that manner.

1993 Minnesota Statute.

The Minnesota Legislature, in a special session in 1993, enacted the Omnibus Health and Human Services Act. Included in that act was the following 1993 amendment to Minn. Stat. § 147.01, subd. 6:

> Subd. 6. [LICENSE SURCHARGE.] In addition to any fee established under section 214.06, the board shall assess an annual license surcharge of $400 against each physician licensed under this chapter. The surcharge applies to a physician who is licensed as of or after the effective date of this section in Laws 1992, and whose license is issued or renewed on or after April 1, 1992, and is assessed as follows:
>
> * * * *

Other sections of the 1993 enactment at issue include:

> Sec. 129 [LEGISLATIVE INTENT.] Section 6 * * * [is] intended to clarify, rather than to change, the original intent of the statutes amended.
>
> Sec. 135 [EFFECTIVE DATES.] Subd. 7, Sections 6 and 129 are effective the day following final enactment and apply to cases pending or brought on or after their effective date.

The 1993 amendment provisions are also set out verbatim in the appendix at page A-70.

STATEMENT OF THE CASE

In 1992, the 1991 Minnesota Legislature enacted Minn. Stat. § 147.01, subd. 6, which is quoted above. The statute directs the Respondent Board of Medical Practice to assess an annual surcharge of $400 on physicians in addition to the physician license fee. Minn. Stat. § 147.01, subd. 6 (1992),

which was enacted on April 29, 1992 but which was not effective until October 1, 1992, contains no language applying it to physicians whose licenses were renewed prior to its effective date of October 1, 1992.

It is undisputed that when physician licenses were issued or renewed before October 1, 1992, Respondent Minnesota Board of Medical Practice had no statutory authority to impose a license surcharge. It is also undisputed that no notice of a surcharge was given to the physicians when they renewed or were issued their licenses before October 1, 1992.

Nonetheless, in November 1992, the Respondent Board of Medical Practice issued license surcharge invoices to physicians whose licenses had been issued or renewed between April 1, 1992 and September 30, 1992, billing them each $400 which was due December 15, 1992. (A-48.) Notice of the surcharge was provided with the invoice for payment of the surcharge. (A-49.) The physicians were informed that a penalty and interest would apply the day after the payment was due (up to 24% in the aggregate) and that the Board of Medical Practice would not renew the license of a physician who did not pay the surcharge. Id. The physicians were also informed that there was nothing they could do to alleviate their liability for that surcharge. Court action would be undertaken, where necessary, to collect the surcharge. (A-50.)

Respondent Minnesota Department of Human Services collected the billed amounts. (A-48.) The monies collected were deposited into the general fund of the Respondent State of Minnesota pursuant to Minn. Stat. § 147.01, subd. 6 (1992).

This lawsuit was initiated by Petitioners to recover the $400 wrongfully assessed and collected in December 1992 under the 1992 statute. (A-42.) Petitioners were certified as a class of all physicians whose licenses to practice medicine in Minnesota were issued or renewed between April 1, 1992 and

September 30, 1992 and who were assessed and paid the surcharge under Minn. Stat. § 147.01, subd. 6 (1992). Petitioners' core assertion was that the 1992 statute, by its terms, did not authorize the surcharge on renewals or initial issuances of licenses before its effective date. For that reason, Respondents' action in imposing the surcharge on Petitioners and threatening ruinous sanctions for nonpayment was beyond their legal authority or powers. Petitioners claimed entitlement to recover the $400 surcharge extracted from them under threat that their eligibility to practice medicine in the future would be revoked because Respondents possessed no lawful authority to impose the charge on them.

Respondents filed a motion to dismiss Petitioners' lawsuit. Respondents argued that the statute imposes a surcharge on all physicians holding a license to practice medicine on October 1, 1992. In other words, they argued the surcharge is imposed based on one's status as a licensed physician on October 1, 1992 and is not an annual surcharge triggered by the transaction of renewing one's license or having a license issued.

While this case was pending before the district court on cross-motions for summary judgment, the 1993 Minnesota Legislature amended § 147.01, subd. 6, effective May 28, 1993. The portions of that amendment relevant to this case state:

> Sec. 6. Minnesota Statutes 1992, section 147.01, subdivision 6, is amended to read:
>
> Subd. 6. LICENSE SURCHARGE. In addition to any fee established under section 214.06, the board shall assess an annual license surcharge of $400 against each physician licensed under this chapter. The surcharge applies to a physician who is

> licensed as of or after the effective date of this section in Laws 1992 [October 1, 1992], and whose license is issued or renewed on or after April 1, 1992, and is assessed as follows: ...

(Emphasis added.)

The 1993 Legislature also stated the purpose of the amendment was not to change the law but to state the intent of the 1991 Legislature. The 1993 Legislature subsequently declared that its amendment "clarifies" the intent of the 1991 Legislature and "applies to cases pending" (a surprising enactment since the statute does not direct itself at rules governing judicial remedies). (A-69.)

In addition to arguing that the 1992 statute did not authorize the collection, Petitioners asserted to the district court that the 1993 Legislature's action cannot cure Respondents' problem. Petitioners asserted that if the 1993 statute applies to this case (or if the 1992 statute was applied retroactively), that statute is unconstitutional in that its retroactive application violates the equal protection and due process clauses of the Minnesota and United States Constitutions. In addition, it was argued that the 1993 statute violates the separation of powers clause of the Minnesota Constitution. (A-56, 78, 83.)

By final judgment entered December 3, 1993, the district court, concluding that the 1992 statute was ambiguous, reached the following conclusions of law: (1) that the Minnesota Legislature intended the physicians' license surcharge embodied in Minn. Stat. § 147.01, subd. 6 (1992) to be assessed and collected in 1992 from physicians whose licenses to practice medicine were issued or renewed between April 1, 1992 and September 30, 1992, and who held an active license on October 1, 1992; (2) the application of the 1992

statute and its 1993 amendment to Petitioners is "not a retroactive operation of the statute" and (3) Minn. Stat. § 147.01, subd. 6, and its 1993 "amendment is rationally related to legitimate governmental purpose and does not violate equal protection principles." (A-28.)

Petitioners appealed from the final judgment to the Minnesota Court of Appeals. Petitioners, on appeal, again challenged the statutes on due process and equal protection grounds. (A-99.) By decision dated June 28, 1994, the Court of Appeals affirmed the district court. (A-23.) The Court of Appeals, contrary to the district court's conclusion, concluded that the 1992 statute "plainly applies to all physicians currently licensed under Minnesota law," and held that since failure to apply the license surcharge would not affect a physician's current license but only destroy eligibility for renewal, the statute could not be construed as being retroactively applied to Petitioners. (A-25–26.) The Court of Appeals found no constitutional infirmity in the application of the 1992 statute to Petitioners. (A-27.) The Court of Appeals did not address the 1993 statute. (A-23.)

The Minnesota Supreme Court accepted review of this case. Before the Minnesota Supreme Court, Petitioners renewed their constitutional challenges to the statutes. (A-136.) By decision filed May 9, 1996, the Minnesota Supreme Court issued its opinion affirming the lower courts. (A-1.)

The Minnesota Supreme Court constructed its "majority" opinion by combining opposing minority opinions on the source of the judgment and the theory of liability. Under the Supreme Court's decision, two justices imposed liability under the 1993 statute (the "majority" opinion), two imposed liability under the 1992 statute (the "minority concurring" opinion), five justices ruled the 1992 statute imposed no liability at all (the majority opinion and the three dissenters), three found the 1993 statute unconstitutional (the three dissenters) and two have abstained from any ruling whatsoever on the imposition

of judgment under the 1993 statute (the minority concurring opinion). The majority of the Supreme Court, therefore, ruled no liability under the 1992 statute, and the plurality of the Court has ruled no liability under the 1993 statute on the ground of its unconstitutionality. There is neither a majority nor a plurality of the Court in favor of imposing a tax liability on Petitioners under one statute. The Minnesota Supreme Court, while purporting to affirm the lower courts, in actuality reversed the lower courts with five members (the Minnesota Supreme Court is a seven-member Court) in concurrence that the 1992 statute did not impose liability.

The Minnesota Supreme Court was the first court to conclude (five members in accord) that the 1992 statute did not impose a license surcharge on Petitioners.[1] The Court concluded that whatever may have been the Legislature's unarticulated intention, there was no basis based on the terms of the 1992 statute itself for giving the statute retroactive application and, by its terms, the 1992 statute did not authorize Respondents' collection of the tax from Petitioners. (A-9.) Accordingly, the Supreme Court disagreed with the decision reached by the lower courts that Petitioners were subject to the surcharge based on the 1992 statute.

The Minnesota Supreme Court also, unlike the trial court, concluded in its two justice "majority opinion" that the 1993 statute does not clarify the 1992 statute; rather, the 1993 statute changes the "very nature of the exaction." The Minnesota Supreme Court held that the 1993 statute, unlike the 1992 statute, imposes a wholly new tax based on status -- a "provider's tax" -- not a license surcharge. (A-11.) Thus all

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[1] As previously stated, the trial court held that the 1992 statute (when read in conjunction with the "clarifying" 1993 amendment) imposed liability on Petitioners. (A-28.) The Minnesota Court of Appeals affirmed the lower court, concluding that the 1992 statute, by its terms, authorized the collection of the surcharge on Petitioners. The Minnesota Court of Appeals did not address the 1993 statute. (A-23.)

illusions that the $400 charge was something other than a new "tax" were stripped away by the Supreme Court's straightforward construction of the levy as a "tax." The 1993 statute, as a stand-alone retroactive new tax enacted in May 1993 without any antecedent, imposes an annual tax on the physician by reason of the physician's status as a holder of a license to practice medicine on or at any time after October 1, 1992, provided the license was issued or renewed on or after April 1, 1992.

The Supreme Court, in discussing the enactment of this wholly new tax, concluded:

- Retroactive application of this new tax to a single case "smacks of special legislation of the kind prohibited by Art. XII, § 1, of the Minnesota Constitution." (A-15.)

- The direction for retroactive application "treads dangerously close to the line separating the power of the judiciary from that of the legislature if it does not in fact cross it." (A-15.)

- Allowing the State of Minnesota, a party, "to change the substantive law governing disposition of the action in a manner designed to assure an outcome favorable to the State and to make that change applicable retroactively only to the pending action or an action subsequently brought may well violate due process." (A-15.)

Despite the fact that this wholly new tax's retroactive application to Petitioners "smacks of special legislation" and "may well violate due process," the Supreme Court ultimately concludes that the imposition of the medical license tax was "one of those rare laws whose retroactive operation serves a benign and legitimate purpose." (A-16.) According to the Minnesota Supreme Court, the imposition was "benign and legitimate" because the new tax statute was enacted in response to 1991 changes in federal legislation (42 U.S.C. § 1396(w)(1)(F)) governing state eligibility for federal funding of a portion of Medicaid. (A-14, 16.) The Minnesota Supreme Court did not address Petitioners' equal protection challenge to this 1993 retroactive provider tax.

Based on the Minnesota Supreme Court's opinion, Petitioners sought rehearing on the following grounds:

> (1) The retroactive imposition of a wholly new tax has never been sanctioned by the United States Supreme Court and it is a violation of due process here to impose a wholly new tax on transactions which were made and completed before the enactment of the wholly new taxing statute;
>
> (2) The Minnesota Supreme Court failed to address Petitioners' constitutional challenge to the 1993 statute on the grounds of equal protection;
>
> (3) The Minnesota Supreme Court misconceived that its opinion is one of affirmance when in fact it is one of reversal and therefore its mandate to the district court is in error;

(4) Since the results under the 1992 statute are not and cannot be the same as the results under the 1993 statute, the minority concurring justices, by their determination that the 1992 statute would impose liability on Petitioners, could not possibly concur on the result reached by the majority justices' opinion which rejected liability under the 1992 statute but would impose liability under the 1993 statute; and

(5) The Minnesota Supreme Court erroneously constructed its majority opinion by composing opposing minority opinions on the source of the judgment on the theory of liability and by this device suppressed the publication of the true mandate of the Court, i.e., reversal.

(A-197.) Petitioners' timely requested petition for rehearing was denied on July 29, 1996 (A-22.)

REASONS FOR GRANTING THE WRIT

I. THE MINNESOTA SUPREME COURT'S HOLDING THAT A WHOLLY NEW TAX MAY BE RETROACTIVELY APPLIED DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT HOLDING SUCH A RETROACTIVE APPLICATION VIOLATIVE OF DUE PROCESS.

The Minnesota Supreme Court concluded that the 1993 Minnesota statute created a wholly "new tax" based on physician status -- a provider's tax. The Minnesota Supreme Court held that while the imposition of this wholly "new tax"

on Petitioners may very well violate due process, because the new tax was enacted in response to federal funding legislation, it was "one of those rare laws whose retroactive operation serves a benign and legitimate purpose." Therefore the tax could be retroactively imposed. (A-16.) The Minnesota Supreme Court's decision in this case is the only recorded example found by Petitioners where a statute which otherwise would be declared unconstitutional (i.e., "smacking of special legislation" and "may well violate due process") is ultimately validated solely by the State Legislature's alleged "benign and legitimate" purpose springing from the State's attempt to meet federal funding requirements.[2] In so holding, the Minnesota Supreme Court's decision is directly at odds with past decisions of this Court and the due process clause of the Fourteenth Amendment.

This Court has consistently held that a "wholly new tax" cannot, in accord with the due process guarantee of the United States Constitution, be imposed retroactively. This appears to be so even though such a tax would serve the benign and legitimate purpose of raising money. United States v. Carlton, 512 U.S. 26, 114 S.Ct. 2018, 2023-24, 129 L.Ed.2d 22 (1994); United States v. Hemme, 476 U.S. 558, 568, 106 S.Ct. 2071, 90 L.Ed.2d 538 (1986); United States v. Darusmont, 449 U.S. 292, 299, 101 S.Ct. 549, 66 L.Ed.2d 513 (1981) (per curium); Untermyer v. Anderson, 276 U.S. 440, 48 S.Ct. 353, 72 L.Ed. 645 (1928); Blodgett v. Holden,

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[2] The finding of a "benign and legitimate" purpose is internally contradicted by the Minnesota Supreme Court's observation that the 1993 statute was "characterized" by the Legislature as "clarifying" the 1992 statute, a purpose which the Supreme Court declares is outside its role -- "the 1993 legislature is not the interpreter of laws enacted by a prior legislature." (A-11.) In any case, one presumes that the purposes of the Minnesota Legislature, indeed all legislatures, are "benign and legitimate." The idea that a "benign and legitimate purpose" is a distinct, but rare, impetus for legislation defines a new standard of cynicism.

275 U.S. 142, 147, 48 S.Ct. 105, 72 L.Ed. 206 (1927). After all, one can assume that most, if not all, taxes imposed by a legislature in a democratic republic like the State of Minnesota and all other United States jurisdictions, serve a benign and legitimate purpose. This Court has never, however, sanctioned a wholly new tax being imposed retroactively.

The last time this Court spoke on the constitutionality of the retroactive imposition of a wholly new tax was in United States v. Carlton, 512 U.S. 26, 114 S.Ct. 2018 (1994). In Carlton, this Court recognized that the authority of Blodgett and Untermyer (which involved the nation's first gift tax) applies to those situations involving "the creation of a wholly new tax." 512 U.S. at ___, 114 S.Ct. at 2023. Justice O'Connor, in her concurring opinion, emphasized that in a situation that did involve a wholly new tax (which Carlton did not), such a tax could not, in accord with due process, be imposed retroactively. Justice O'Connor stated:

> But "the Court has never intimated that Congress possesses unlimited power to readjust rights and burdens . . . and upset otherwise settled expectations." Connolly v. Pension Benefit Guaranty Co., 475 U.S. 211, 229, 106 S.Ct. 1018, 1028, 89 L.Ed.2d 166 (1986) (concurring opinion) (brackets omitted), citing Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16, 96 S.Ct. 2882, 2893, 49 L.Ed.2d 752 (1976). The governmental interest in revising the tax laws must at some point give way to the taxpayers' interest in finality and repose. For example, a "wholly new tax" cannot be imposed retroactively, United States v. Hemme, 476 U.S. 558, 568, 106 S.Ct. 2071, 2077-2078, 90 L.Ed.2d 538 (1986),

> even though such a tax would surely serve to raise money. Because tax consequences of commercial transactions are relevant, and sometimes dispositive, consideration of a taxpayer's decisions regarding the use of his capital, it is arbitrary to tax transactions that were not subject to taxation at the time the taxpayer entered into them. See Welch v. Henry, supra, 305 U.S. at 147, 59 S.Ct. at 125-126.

512 U.S. at ___, 114 S.Ct. at 2025.

What the Minnesota Supreme Court never considered was that although the "retroactive operation [of the imposition of a new tax] serves a benign and legitimate purpose" of government (A-16.), it may nonetheless be arbitrary and irrational, and therefore a violation of due process, to impose on the taxpayers a duty to pay a new status tax based on a status acquired long before the Legislature enacted such a tax. By the Minnesota Supreme Court's own ruling, there is no question that the physician who was issued his license between April 1 and September 30, 1992 could not have anticipated that at the time the transaction was completed, he would owe a provider tax pursuant to a May 1993 enactment, based solely upon that 1992 transaction. Some physicians, especially those who are retired or who practice outside the State of Minnesota but nonetheless hold a license in Minnesota, may have altered their behavior if they had known of the tax by refusing to renew their licenses and therefore avoiding the tax.

The Minnesota Supreme Court completely ignored the taxpayers' interest in finality and repose, instead focusing its attention on the governmental purpose behind the statute's enactment. Now, according to the Minnesota Supreme Court, due process considerations are simply overridden when the

new state tax being retroactively imposed is being imposed "for a benign and legitimate purpose" -- in this case to meet federal funding eligibility requirements. The Minnesota Supreme Court has really created a standard by which no retroactive new tax could ever be deemed unconstitutional. After all, one can presume that most, if not all, retroactive taxing statutes have a legitimate and benign governmental purpose in mind. Furthermore, the Minnesota Supreme Court appears to sanction the tax because of the change in federal legislation, raising the additional question of whether federal funding requirements can somehow override a state taxpayer's rights of due process. The Minnesota Supreme Court's analysis cannot be the analysis utilized under the due process clause.

Under the Minnesota Supreme Court's ruling, no citizen of the State of Minnesota can ever be certain of the full consequences of any transaction or the price of any license. The State Supreme Court has sanctioned insecurity and uncertainty in direct contravention to the due process guarantee of the United States Constitution. In accord with this Court's decisions, the retroactive taxation of a voluntary transaction that was not subject to taxation at the time it was accomplished is arbitrary and thus a violation of due process.

As previously stated, the Minnesota Supreme Court, in its decision, ignored this Court's decisions which have refused to sanction the retroactive imposition of a wholly new tax. The Minnesota Supreme Court, instead, relied on Welch v. Henry, 305 U.S. 134, 59 S.Ct. 121, 83 L.Ed. 87 (1938), reh'g. denied, a case where the challenged revenue act retroactively imposed a tax on certain dividend income that had formerly been excluded from taxation. While holding the retroactive taxation constitutional under the facts of that case, this Court stated that a different case would be presented where a transaction was taxed that was "completely vested before the enactment of the taxing statute," and "the nature or amount of the tax

could not reasonably have been anticipated by the taxpayer at the time of the particular voluntary act which the statute later made the taxable event." 305 U.S. at 147.

Here, the transaction that was taxed -- issuance of the license -- was completely vested before the enactment of the taxing statute. Neither the nature nor amount of the tax could have reasonably been anticipated by the taxpayer at the time of the license renewal or issuance, which the statute later made the taxable event. In May 1993, when the 1993 Legislature imposed the new tax on transactions completed some 7 to 13 months earlier, it was impossible for the taxpayers to avoid the tax by any remedial behavior.

Furthermore, this Court has stated that an excessive period of retroactivity (regardless of whether it involved a wholly new tax) may run afoul of the due process clause. United States v. Carlton, 512 U.S. at ___, 114 S.Ct. at 2023-24. In every case in which this Court has upheld a retroactive tax statute against due process challenge, the law applied retroactively for only a relatively short period prior to enactment. See United States v. Hemme, 476 U.S. at 562 (one month); United States v. Darusmont, 449 U.S. at 294-95 (ten months) and United States v. Hudson, 299 U.S. 498, 57 S.Ct. 309, 81 L.Ed. 370 (1937) (one month). In Welch v. Henry, the tax was enacted in 1935 to reach transactions completed in 1933; but this Court emphasized that the Wisconsin State Legislature met only bi-annually and it made the revision "at the first opportunity after the tax year in which the income was received." 305 U.S. at 151. In this case, the effective date of the 1993 Statute was May 28, 1993, by which the Legislature seeks to collect a new tax on transactions completed between April 1, 1992 and September 30, 1992. Accordingly, for some of the Petitioners, there is a period of retroactivity of over one year.

The conflict between this Court's decisions and the instant case could not be more complete. Consideration by this Court is essential.

II. WHETHER A RETROACTIVE TAX WHICH SELECTS ONE-HALF OF THE LICENSED PHYSICIANS BY REASON OF BIRTH DATE TO PAY THE TAX AND EXCUSES THE REST IS VIOLATIVE OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT PRESENTS AN IMPORTANT FEDERAL QUESTION THAT SHOULD BE SETTLED BY THIS COURT.

The command of the Equal Protection Clause of the Fourteenth Amendment that "no State shall deny to any person within its jurisdiction the equal protection of the laws" is essentially a direction that all persons similarly situated should be treated alike. City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). In order to satisfy equal protection requirements under the Federal Constitution, this Court has held that all classes created by statute must be reasonably related to a legitimate state interest. Id. "The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." 473 U.S. at 446.

Even utilizing this most deferential equal protection standard, there simply is no rational relationship between the classification adopted by the Minnesota Legislature in the 1993 statute and the object to be attained.

The Minnesota Supreme Court completely ignored Petitioners' equal protection challenge to the 1993 statute. The Minnesota Supreme Court concluded that the 1993 provider tax was enacted to meet the requirements of the 1991

federal changes in legislation governing state eligibility for federal funding of Medicaid. (A-16.) The Minnesota Supreme Court never addresses how this "reason" could possibly justify, under an equal protection analysis, application of the 1993 Statute to tax retroactively, on the basis of status alone, only physicians who happened to have their licenses come up for renewal between April 1 and September 30, 1992 [renewal is determined by birth date] or who were initially licensed during this period and held an active license on October 1, 1992.

So even if a retroactive provider tax is somehow justifiable on due process grounds, this case presents the important equal protection question of how it can be that a state legislature may arbitrarily select approximately one-half of the State's physician census on the basis, primarily, of birth date to pay a wholly retroactive tax and excuse the rest of the physicians in the same provider class from any retroactive tax liability? After all, the same amount of money necessary to satisfy the State Legislature's fiscal objective for federal funding purposes could have been raised by levying a tax of $200 on all physicians who held an active license on October 1, 1992. What possible justification can exist for satisfying the entire October 1, 1992 fiscal objective by a retroactive tax on one-half of the physicians and excusing completely the other half? The key question -- how is selection of Petitioners' class alone for retroactive taxation justified or rationalized -- has never been answered. The State of Minnesota has never explained why a retroactively determined need to raise more money justified retrospectively selecting this group of physicians alone to fund this need.

Now, according to the Minnesota Supreme Court, the Minnesota Legislature, when it needs more money, can simply select from among its licensees those it chooses to tax retroactively and, based on some arbitrary selection criteria, say by birth date as done here or perhaps by eye color, raise

the necessary funds. The Minnesota Supreme Court has ignored the equal protection problem inherent in the Minnesota Legislature's action. This case presents an important constitutional question that should be settled by this Court.

III. THE MINNESOTA SUPREME COURT'S CONSTRUCTION OF ITS "MAJORITY" RAISES AN IMPORTANT AND UNRESOLVED DUE PROCESS ISSUE.

This case raises a unique but singularly important issue of whether a state supreme court may arbitrarily declare that its ruling is against a party despite the fact that its published ruling actually determines the matter in favor of that party. The question that needs to be resolved is whether the Minnesota Supreme Court can, in accord with due process, impose a tax on Petitioners where it has determined by its majority and plurality opinions that no valid state statute imposes the tax liability on Petitioners.

The assumption inherent in the opinion issued by the Minnesota Supreme Court that it is affirming the judgment of the district court and the Court of Appeals is erroneous. The trial court held that the 1992 statute (when read in conjunction with the "clarifying" 1993 amendment) provided that Petitioners are liable under the 1992 statute for the surcharge previously billed and collected by the State if the physician was holding a license on October 1, 1992. (A-28.) The Minnesota Court of Appeals affirmed the lower court, concluding that the 1992 statute, by its terms, authorized the collection of the surcharge on Petitioners. The Court of Appeals did not address the 1993 statute. (A-23.) Only the minority concurring opinion of the Minnesota Supreme Court would affirm the district court, albeit with modifications. (A-16.) (The concurring justices would not require the physician

to be holding a license on October 1, 1992 as the trial court required, because the minority, unlike the district court, imposes the 1992 surcharge without reading into it the engrossments from the 1993 statute.)

The Minnesota Supreme Court, in actuality, reversed the district court with five members of the seven member Court in concurrence that the 1992 statute did not authorize collection from the Petitioners (the two justice "majority" and the three "dissenters"). (A-5, 20–21.) The Minnesota Supreme Court was therefore the first court to conclude that the 1992 statute did not impose a license surcharge on physicians whose licenses to practice medicine were issued or renewed between April 1 and September 30, 1992 and who held active licenses on October 1, 1992. Accordingly, the Minnesota Supreme Court disagreed with the decision reached by the lower courts that Petitioners were subject to the surcharge based on the 1992 statute.[3]

The two justice "majority opinion" ruled that the 1993 statute enacted in May 1993 is a stand-alone retroactive new tax enacted for the first time without any antecedent and would justify imposing a $400 retroactive tax on those members of Petitioners holding their licenses on October 1, 1992. The Minnesota Supreme Court, unlike the trial court, concluded that the 1993 statute does not clarify the 1992 statute; rather, the 1993 statute changes the "very nature of the exaction." The Minnesota Supreme Court concluded that the 1993 statute, unlike the 1992 statute, imposed a wholly new tax based on status -- a "provider's tax," not a license surcharge. (A-11.)

Because two separate minority contingents on the Minnesota Supreme Court concluded that two entirely separate statutes imposed coincidental $400 tax liability on

---

[3] Petitioners have never been assessed the 1993 retroactive new tax at any time and therefore did not pay it.

Petitioners, the Supreme Court declared a majority of the Court thus favored affirmance of the lower courts. The result is to impose a tax on Petitioners that has never been validly imposed by the Legislature, the sole body of the state government that may impose a tax. Indeed it is not a stretch to declare that the imposition of such a tax by the Court denies Petitioners their constitutional guarantee of a republican form of government.

As reported, the Minnesota Supreme Court's "majority" opinion that liability is to be imposed under the 1993 statute is only supported by a two justice minority whose ruling is overruled by three justices (the dissent). The stated "concurring minority" makes no comment on the validity of the 1993 statute and would impose liability under the 1992 statute, which decision is rejected by five other justices. (A-16.) In fact, the sum of the "majority" and "concurring" opinions would be to impose a $400 surcharge on Petitioners in 1992 and a $400 retroactive new tax in 1993 on some of the Petitioners for a total liability of $800. These are not, by any stretch, "concurring opinions."

Tallying the votes, two justices would have liability imposed under the 1993 statute, two under the 1992 statute, five have ruled the 1992 statute imposes no liability at all, and three have found the 1993 statute unconstitutional. In summary, the majority of the Minnesota Supreme Court is in favor of no liability under the 1992 statute. The plurality is in favor of no liability under the 1993 statute. There is no majority in favor of affirmance. Nonetheless the Supreme Court states it affirms the lower courts.

It is Petitioners' position that the Minnesota Supreme Court cannot, in accord with due process under the Fourteenth Amendment affirm when there is, in fact, no majority in favor of affirmance. When this obvious problem was raised in Petitioners' petition for rehearing, no action was undertaken by the Minnesota Supreme Court to remedy the

problem. (A-19.) This is, therefore, the only Court to which Petitioners can turn to remedy and to address this important issue. Review by this Court is necessary.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

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Dated: October 25, 1996

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547 N.W.2d 366
(Cite as: 547 N.W.2d 366)

Dr. Frank A. UBEL, M.D., and Dr. Howard Anderson, M.D., each individually and as members of a class of persons similarly situated, plaintiffs/class representatives, petitioners, Appellants,

v.

STATE of Minnesota, et al., Respondents.

No. C7-94-300.

Supreme Court of Minnesota.

May 9, 1996.

Rehearing Denied July 29, 1996.

Class of physicians brought action against state, Board of Medical Practice, and Department of Human Services, challenging assessment of medical license surcharge. The District Court, Hennepin County, Harvey C. Ginsberg, J., granted summary judgment for defendants. Physicians appealed. The Court of Appeals, Parker, J., 1994 WL 284973, affirmed. Physicians appealed. The Supreme Court, Coyne, J., held that: (1) statute governing assessment of surcharge was clear and unambiguous; (2) obligation of paying surcharge was fixed at time of issuance or renewal of license; and (3) amendment would be given retroactive application.

Affirmed.

Tomljanovich, J., filed an opinion concurring in the result, in which Stringer, J., joined.

Page, J., filed a dissenting opinion, in which Gardebring and Anderson, JJ., joined.

[1] PHYSICIANS AND SURGEONS 2
299k2
Obligation of paying annual physician license surcharge was assessed and therefore fixed and imposed, under statute authorizing Board of Medical Practice to assess surcharge, at time of issuance or renewal of license, despite delay in billing for surcharge, for purposes of determining whether statute applied retroactively to physicians whose licenses were issued or renewed before effective date of statute and who were assessed surcharge. (Per Coyne, J., with one judge concurring and two judges concurring in the result.) M.S.A. § 147.01, subd. 6.

[2] PHYSICIANS AND SURGEONS 2
299k2
Statute authorizing Board of Medical Practice to assess annual physician license surcharge could not be given retroactive application, whatever legislature's unarticulated intention may have been, where legislature declared that effective date of statute was five months after enactment and there was nothing in statute to indicate that statute was to be applied retroactively. (Per Coyne, J., with one judge concurring and two judges concurring in the result.) M.S.A. § 147.01, subd. 6.

[3] STATUTES 262
361k262
Generally, statutes are presumed to operate only prospectively, and only if legislature clearly prescribes retroactive application will statute be permitted to operate retroactively. (Per Coyne, J., with one judge concurring and two judges concurring in the result.) M.S.A. § 645.21.

[3] STATUTES 263

361k263

Generally, statutes are presumed to operate only prospectively, and only if legislature clearly prescribes retroactive application will statute be permitted to operate retroactively. (Per Coyne, J., with one judge concurring and two judges concurring in the result.) M.S.A. § 645.21.

[4] PHYSICIANS AND SURGEONS 2

299k2

Legislative act modified rather than merely clarified clear and unambiguous statute authorizing Board of Medical Practice to exact fee on issuance or annual renewal of physician license, for purposes of determining whether clarified statute clearly established that assessment was to be exacted retroactively or whether court would have to address issue of retroactivity of modified statute; act changed nature of exaction from license surcharge to tax on status as holder of physician license, despite continued designation as license surcharge, by changing when debt came into existence from date of and by reason of issuance or renewal of license to date some time later, based on status as license holder. (Per Coyne, J., with one judge concurring and two judges concurring in the result.) M.S.A. § 147.01, subd. 6.

[5] STATUTES 210

361k210

Appellate court is not bound by legislature's characterization of statutory amendment as a clarification, where to do so would constitute abandonment of duty to interpret and apply the law. (Per Coyne, J., with one judge concurring and two judges concurring in the result.)

[6] STATUTES 220
361k220
One legislature is not the interpreter of laws enacted by prior legislature. (Per Coyne, J., with one judge concurring and two judges concurring in the result.)

[7] PHYSICIANS AND SURGEONS 2
299k2
Although effective date of statutory amendment was prospective, amendment's language authorizing Board of Medical Practice to assess annual physician license surcharge compelled retroactive application of statute; language specified first day and year on which surcharge applied. (Per Coyne, J., with one judge concurring and two judges concurring in the result.) M.S.A. § 147.01, subd. 6.

***367** Syllabus by the Court

Minn.Stat. § 147.01, subd. 6, as amended in 1993, imposes a provider surcharge against each physician who, on October 1, 1992, held a license to practice medicine which was issued or renewed on or after April 1, 1992.

Lommen, Nelson, Cole & Stageberg, P.A., Kay Nord Hunt, Phillip A. Cole, Terrance W. Moore, Minneapolis, for appellants.

Hubert H. Humphrey, HI, Atty. Gen., Alison E. Colton, Asst. Atty. Gen., St. Paul, for respondents.

Heard, considered, and decided by the court en banc.

OPINION

COYNE, Justice.

In this class action physicians whose licenses to practice medicine were initially issued or were renewed between April 1, 1992 and September 30, 1992, challenge the assessment of a $400 license surcharge payable on or before December 15, 1992 pursuant to Minn.Stat. § 147.01, subd. 6 (1992). The district court ruled that the statute was ambiguous and that on the basis of legislative history and a 1993 "clarifying" amendment the assessment was a proper application of the statute. On appeal from summary judgment in favor of the defendants--the State of Minnesota, Minnesota Board of Medical Practice and Minnesota Department of Human Services--the court of appeals affirmed, concluding that the statute as originally enacted plainly and unequivocally imposed the license surcharge against the members of the plaintiff class. We affirm.

The statutory subdivision in question, Minn.Stat. § 147.01, subd. 6 (1992), is set out below in its entirety:

> Subd. 6. License surcharge. In addition to any fee established under section 214.06, the board shall assess an annual license surcharge of $400 against each physician licensed under this chapter as follows:
>
> (1) a physician whose license is issued or renewed between April 1 and September 30 shall be billed on or before November 15, and the physician must pay the surcharge by December 15; and
>
> ***368** (2) a physician whose license is issued or renewed between October 1 and March 31 shall be billed on or before May 15, and the physician must pay the surcharge by June 15.
>
> The board shall provide that the surcharge payment must be remitted to the commissioner of human services to be deposited in the general fund under section 256.9656. The board shall not renew the license of a physician who has not

paid the surcharge required under this section. The board shall promptly provide to the commissioner of human services upon request information available to the board and specifically required by the commissioner to operate the provider surcharge program. The board shall limit the surcharge to physicians residing in Minnesota and the states contiguous to Minnesota upon notification from the commissioner of human services that the federal government has approved a waiver to allow the surcharge to be applied in that manner.

This subdivision was enacted on April 29, 1992. By 1992 Minn. Laws, ch. 513, art. 7, § 137, the legislature set the date on which the statute became effective at a date 5 months later, on October 1, 1992. Act of Apr. 29, 1992, ch. 513, art. 7, § 137, 1992 Minn. Laws 835, 1086.

The district court considered the statute ambiguous and looked to legislative history for resolution of the question whether the plaintiffs, whose medical licenses were initially issued or renewed between April 1, 1992 and September 30, 1992, were liable for a surcharge payable by December 15, 1992. Concluding that the amount of money the legislature expected to raise by June 30, 1993 could be derived from physician license surcharges only if the surcharge were assessed against physicians whose licenses were issued between April 1, 1992 and September 30, 1992, the district court ruled that the plaintiff physicians must pay the surcharge on their 1992 licenses. Because the failure to pay the 1992 surcharge was not grounds for revocation of the license issued prior to the effective date of the statute but only precluded issuance of a license in 1993 and thereafter, the district court declared application of the statute to the plaintiff class was not retroactive application.

The ambiguity which precipitated the district court's recourse to legislative history lies, however, not in the language of section 147.01, subd. 6 (1992) but is introduced by the language which the State and the other defendants add in order to justify their construction and application of the statute. The defendants contend that the 1992 version of the statute imposes a license surcharge "on physicians whose licenses to practice medicine were issued or renewed between April 1 and September 30, 1992 and who held active licenses on October 1, 1992." But, of course, that is not what the statute provides, and if a review of the statute is confined to the words of the statute enacted on April 29, 1992, the statutory mandate is readily apparent. The statute directs the Board of Medical Practice to assess an annual license surcharge of $400 in addition to the license fee the Board assesses pursuant to the authorization provided by Minn.Stat. § 214.06 (1992). The Board is also required to bill on or before November 15 physicians whose licenses are issued or renewed between April 1 and September 30 and to instruct them to remit the surcharge to the commissioner of human services on or before December 15. The Board is further directed to bill on or before May 15 physicians whose licenses are issued on or renewed between October 1 and March 31 with the instruction that the surcharge is to be remitted to the commissioner of human services by June 15.

[1] A "surcharge" is an additional or extra charge which is sometimes defined as an excessive price. Here the $400 license surcharge is assessed "in addition to any fee" the Board is authorized to impose by reason of the issuance or renewal of a license to practice medicine. It is the issuance or annual renewal of the license which precipitates both the imposition of the fee authorized by section 214.06 and the surcharge assessed "in addition to" the section 214.06 fee. The fee fixed by the Board pursuant to section 214.06 is, of course, payable

to the Board at the time the license is issued or renewed. Although the surcharge is assessed and the obligation to pay the surcharge comes into *369 existence when the license is issued or renewed, the surcharge is not then payable. If the license is issued or renewed between April 1 and September 30, the due date for payment of the license surcharge is December 15, and if the license is issued or renewed between October 1 and March 31, the license surcharge is payable on June 15, just before the end of the State's fiscal year. Unlike the license fee paid to the Board, which is credited to the special revenue fund, the license surcharge must be paid to the commissioner of human services for deposit in the general fund pursuant to Minn.Stat. § 256.9656 (1994). Hence, the commissioner need anticipate receipt of license surcharge payments only twice each fiscal year with about half of them arriving on or about December 15 and the remainder of them being received on or about June 15.

It must also be noted that the Board is required to "assess" an annual license surcharge "in addition to any fee established under section 214.06"--a process which takes place on issuance or renewal of the license. According to the mandate of section 147.01, subd. 6, the surcharge on any license issued between April 1 and September 30 is simply to be "billed"--not "assessed"--on or before November 15, and the surcharge on a license issued or renewed between October 1 and March 31 is to be "billed"--not "assessed"--on or before May 15. Thus, the obligation to pay the surcharge is fixed when the license is issued or renewed on a date between April 1 and September 30, but the bill for the surcharge is not presented until November 15 and payment is not due until December 15. The arrangement is not unlike that provided by the furniture store that advertises "Buy now; pay later." Most assuredly, it is the physician holding the license who is billed and who must pay the surcharge, but the license is hostage for the payment: if the

surcharge is not paid, the Board is forbidden to renew the license even though the physician is otherwise fully qualified.

[2][3] The language and structure, of Minn.Stat. § 147.01, subd. 6 (1992), convince us that the plaintiff class of physicians is liable for the surcharge with respect to licenses issued between April 1, 1992 and September 30, 1992 only if the 1992 statute is given retrospective effect. Generally, of course, a statute is presumed to operate only prospectively. Only if Congress or the legislature clearly prescribes retroactive application will a statute be permitted to operate retroactively. E.g., Landgraf v. USI Film Products, 511 U.S. 244, ---, 114 S.Ct. 1483, 1499, 128 L.Ed.2d 229 (1994); Baertsch v. Minnesota Dep't of Revenue, 518 N.W.2d 21, 24 (Minn.1994). Moreover, Minn.Stat. § 645.21 (1994) codifies the presumption against retroactivity:

> No law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature.

Subdivision 6 of section 147.01 was enacted on April 29, 1992. Had the legislature made the statute effective on the day of enactment, the surcharge could have been properly assessed with respect to all licenses issued or renewed between April 29, 1992 and September 30, 1992, and if the legislature had considered it important to assess a surcharge with respect to licenses issued or renewed during the first 28 days of April 1992, it could have declared the statute to be effective retroactively to April 1, 1992. But the legislature did neither of these things. Instead, it declared October 1, 1992, a date more than 5 months in the future, to be the effective date. Whatever may have been the legislature's unarticulated intention, there is no basis for giving the statute retroactive application.

[4] While cross-motions for summary judgment were pending before the Hennepin County District Court, the

legislature, in special session, enacted the Omnibus Health and Human Services Act. Included in that act was the following amendment to Minn.Stat. § 147.01, subd. 6 (1992):

> Sec. 6. Minnesota Statutes 1992, section 147.01, subdivision 6, is amended to read:
>
> Subd. 6. [LICENSE SURCHARGE.] In addition to any fee established under section 214.06, the board shall assess an annual license surcharge of $400 against each physician licensed under this chapter. The surcharge applies to a physician who is licensed as of or after the effective date of this section in Laws 1992, and whose ***370** license is issued or renewed on or after April 1, 1992, and is assessed as follows:
>
> * * * * * *

Act of May 27, 1993, ch. 1, art. 5, § 6, 1 Sp.1993 Minn. Laws 3019, 3137. The remainder of subdivision 6 was unchanged, but other sections of the 1993 enactment purported to cast the amendment as a clarification and to give the amendment special retroactive effect:

> Sec. 129 [LEGISLATIVE INTENT.] Section 6 * * * [is] intended to clarify, rather than to change, the original intent of the statutes amended.
>
> Sec. 135 [EFFECTIVE DATES.] Subd. 7. Sections 6 and 129 are effective the day following final enactment and apply to cases pending or brought on or after their effective date.

Id. §§ 129, 135.

[5][6] We have, on at least two occasions, pointed out that we are not bound by the legislature's characterization of an amendment as a "clarification." Honeywell v. Minnesota Life & Health Ins. Guaranty Assoc., 518 N.W.2d 557, 562 (Minn.1994); Rural American Bank of Greenwald v. Herickhoff, 485 N.W.2d 702, 709 (Minn.1992) (Simonett, J.,

concurring specially). To simply adopt the legislature's "clarification" would constitute an abandonment of our duty to interpret and apply the law. Moreover, the 1993 legislature is not the interpreter of laws enacted by a prior legislature. See Anderson v. Firle, 174 Minn. 333, 337, 219 N.W. 284, 285 (1928).

Here, clarification of a statute which we regard as clear and unambiguous is inappropriate. Indeed, the 1993 amendment does not clarify the subdivision enacted in 1992; rather, that amendment modifies the substance of the 1992 law--the 1993 amendment changes the very nature of the exaction. Whether that metamorphosis occurred by design or by happenstance is not apparent, but despite the continued designation of the required $400 payment as a "license surcharge," the 1993 amendment imposes a tax based on status--a "provider's tax"--not a license surcharge. The 1992 statute imposed a surcharge on the license to practice medicine, and assessment was triggered by issuance or renewal of the license. Although payment was not due until either June 15 or December 15, the debt came into existence on issuance or renewal of the license. The 1993 amendment, on the other hand, imposes an annual surcharge on the physician by reason of the physician's status as holder on or at any time after October 1, 1992 of a license to practice medicine, provided the license was issued or renewed on or after April 1, 1992, but that surcharge is not levied and does not become a debt until November 15.

[7] Included in the 1993 statute is a provision which sets the date following final enactment--May 28, 1993--as the effective date and also provides that the 1993 act applies to cases pending or brought on or after the effective date. Despite the presumption against retroactivity, a doctrine deeply rooted in our jurisprudence because considerations of fairness demand that individuals should have an opportunity to know what the

law is before they act, the legislature could have provided that the 1993 amendment was to have retroactive application and that the effective date of the 1993 amendment should be October 1, 1992. Although the retroactive application of a statute creating a new tax was once considered unconstitutional, e.g., Nichols v. Coolidge, 274 U.S. 531, 47 S.Ct. 710, 71 L.Ed. 1184 (1927); Blodgett v. Holden, 275 U.S. 142, 48 S.Ct. 105, 72 L.Ed. 206 (1927), today's constitutional impediments to retroactive civil legislation are, as the United States Supreme Court puts it, "now modest." Landgraf v. USI Film Products, 511 U.S. 244, 114 S.Ct. 1483, 1501, 128 L.Ed.2d 229 (1994). Consequently, had the legislature elected to set an effective date retroactive to October 1, 1992, such a forthright statement of limited retroactivity would almost certainly have forestalled any serious challenge of the constitutionality of a $400 assessment against physicians who, on October 1, 1992, held a medical license which was issued on or after April 1, 1992.

The provisions of the 1993 statute, including the provision setting an effective date, and the circumstances of its enactment call to *371 mind a tax statute adopted by the Wisconsin Legislature in 1935. Act of March 27, 1935, ch. 15, 1935 Wisc. Laws 19. When it convened in January 1935, in the depths of the Great Depression, the Wisconsin Legislature was confronted by a fiscal emergency--a shortfall in the revenue required to meet the state's obligations. In order to meet the revenue demand the legislature adopted a statute which was effective March 27, 1935 and which imposed a tax on dividend income received in 1933 and 1934. The due dates for filing tax returns and for the payment of the tax attributable to both 1933 and 1934 preceded the effective date of the statute, and at the times the dividends were received and the 1933 and 1934 returns filed, the dividends were not taxable. Despite the legislature's designation of

March 27, 1935 as the effective date of the statute, the United States Supreme Court simply recognized the statute as imposing a retroactive tax and treated the statute as having retrospective application. Welch v. Henry, 305 U.S. 134, 144, 153, 59 S.Ct. 121, 124, 83 L.Ed. 87 (1938).

Like the 1935 Wisconsin statute which in 1935 imposed a tax on dividends received in 1933, the statute with which we are here concerned, adopted on May 27, 1993, imposes a tax on physicians who, on October 1, 1992 held a license to practice medicine that had been issued or renewed on or after April 1, 1992. In both cases the taxable event--the receipt of dividends in the Wisconsin case and the possession on October 1, 1992 of a medical license issued or renewed on or after April 1, 1992 in the Minnesota case--antedated the statute. Like the United States Supreme Court in the Welch case, we recognize that, despite the legislature's designation of May 28, 1993 as the effective date of the 1993 act, the language of the statute--namely, the incorporation for the first time of the specific day and year on which the initial taxable event occurs--compels retrospective application. [FN1]

FN1. We also recognize that the legislature's characterization of the 1993 amendment as a "clarification" may have been intended to cause the court to accord the amendment retrospective application regardless of the legislature's gesture toward prospective application.

Because the defendants have, ever since the effective date of the 1992 statute, relied on legislative history to justify their application of that statute, the record before us includes information about the circumstances which prompted its enactment.

In 1991, the legislature imposed health care provider surcharges on licensed nursing homes, hospitals, and health maintenance organizations. Minn.Stat. § 256.9657

(Supp.1991). In the fall of 1991 Congress changed the federal law governing provider taxes and required states with fiscal years beginning on or before July 1, like Minnesota, to comply with the new law by October 1, 1992. 42 U.S.C. § 1396b(w)(1)(F) (1994). That the legislature attempted to bring Minnesota into timely compliance is indicated by its amendment of Minn.Stat. § 256.9657 (1992), particularly by the addition of subdivision 8 of section 256.9657, and by the enactment of Minn.Stat. § 147.01, subd. 6 (1992). As a part of the same bill, the rate of payment to physicians for medical services rendered on or after October 1, 1992, pursuant to the program of medical assistance was increased.

By the time the parties had submitted crossmotions for summary judgment in the spring of 1993, the legislature apparently recognized that it had made a mistake--that section 147.01, subdivision 6, did not require physicians whose licenses to practice medicine were issued or renewed between April 1 and September 30 to pay a surcharge until December 15, 1993. The legislature obviously hastened to correct its mistake, for the 1993 amendment was enacted by May 27, 1993. With its customary 20/20 clarity, hindsight suggests that it would have been preferable for the legislature to acknowledge its mistake and set the effective date as if it had been contained in the original enactment. E.g., United States v. Carlton, --- U.S. ---, ---, 114 S.Ct. 2018, 2023, 129 L.Ed.2d 22 (1994). Instead, the legislature characterized the 1993 amendment as a "clarification" and declared the day following the final enactment to be the effective date, limiting retroactive application only to cases pending or brought on or after the effective date. The plaintiff class assures us that theirs is the only case pending on the effective date of the *372 1993 amendment, an assertion with which the defendants do not quarrel. Limiting retroactive application of a tax statute to a single case smacks of special legislation of the kind

prohibited by Art. XII, § 1 of the Minnesota Constitution. Moreover, the direction for retroactive application of a tax statute limited to pending cases treads dangerously close to the line separating the power of the judiciary from that of the legislature if it does not in fact cross it.

Furthermore, the 1993 amendment was adopted after the parties had interposed crossmotions for summary judgment. The State of Minnesota, one of its agencies and one of its boards are the defendants in this action. For the State, a party, to change the substantive law governing disposition of the action in a manner designed to assure an outcome favorable to the State and to make that change applicable retroactively only to the pending action or an action subsequently brought may well violate due process, for it suggests that the legislature acted with an improper motive--targeting the plaintiffs because they objected to the unlawful exaction of a surcharge.

I do not understand the dissent's charge that there is no basis for giving the statute retroactive effect. I have merely tried to explain that by its own terms the 1993 amendment necessarily requires retrospective application--that is, it imposes a retroactive tax--a tax based on an event which occurred before enactment of the amendment. As for the attempt at section 135 of the session law (1 Sp.1993 Minn. Laws, ch. 1, art. 5, § 135) amending Minn.Stat. § 147.01, subd. 6 to set the effective date and application of the amendment, no one has ever suggested that the United States Supreme Court rewrote the Wisconsin tax law when it snubbed the Wisconsin legislature's designated effective date and simply recognized the statute as imposing a retroactive tax. In any event 1 Sp. Minn. Laws, ch. 1, art. 5, § 135 is not only uncodified but is patently severable from Minn.Stat. § 147.01, subd. 6 as amended in 1993.

Because the amended statute, by its terms, imposes a retroactive $400 surcharge against each physician in the plaintiff class--i.e., each physician who held on or after October 1, 1992 a license to practice medicine issued or renewed on or after April 1, 1992--we affirm the decision of the court of appeals, albeit for different reasons.

As the United States Supreme Court explained in Landgraf v. USI Film Products, --- U.S. ----, ----, 114 S.Ct. 1483, 1498, 128 L.Ed.2d 229 (1994):

> Retroactivity provisions often serve entirely benign and legitimate purposes, whether to respond to emergencies [or] to correct mistakes * * *. However, a requirement that [the legislature] first make its intention clear helps ensure that [the legislature] itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness.

The imposition of the annual medical license surcharge in response to 1991 changes in federal legislation governing state eligibility for federal funding of a portion of Medicaid (called Medical Assistance in Minnesota) was, we believe, one of those rare laws whose retroactive operation serves a benign and legitimate purpose.

Affirmed.

TOMLJANOVICH, Justice (concurring):

I concur only in the result of the majority.

It seems to me that as enacted, Minn.Stat. § 147.01, subd. 6 (1992) is ambiguous. A statute is ambiguous if it is susceptible to more than one reasonable interpretation. Glen Paul Court Neighborhood Ass'n v. Paster, 437 N.W.2d 52, 56

(Minn.1989). Though enacted on April 29, 1992, it was not made effective until October 1, 1992. From this it is reasonable to conclude that the class of physicians whose licenses were issued or renewed between April 1 and September 30, 1992 would not be required to pay the surcharge in 1992. Instead, the first payment due would be from the class of physicians whose licenses were issued or renewed between October 1 and March 31 of 1992-93.

On the other hand, the billing for the surcharge is not required to be completed until November 15 and payment is not due until December 15. This leaves two and a half months subsequent to the statute's effective *373 date in which physicians whose licenses were issued or renewed before October 1, 1992 could pay the surcharge. From this it is reasonable to conclude that the legislature intended this group of physicians to pay the surcharge. Thus, I would find section 147.01, subd. 6 ambiguous.

Where the intention of the legislature is clearly manifested by plain unambiguous language, no construction is necessary or permitted. Lenz v. Coon Creek Watershed Dist., 278 Minn. 1, 9, 153 N.W.2d 209, 216 (1967). However, if a statute is ambiguous, a court may refer to the legislative history surrounding the statute's enactment to ascertain its legislative intent. Minn.Stat. § 645.16(7) (1994).

Legislative history indicates the legislature anticipated that the annual surcharge would generate approximately $4.362 million in revenues for fiscal year 1993. [FN1] Respondents point out that the only way the state could generate this amount of revenue for fiscal 1993 would be to surcharge both groups--approximately 11,000 physicians in all. Thus, the legislature must have intended to surcharge the group of

physicians whose licenses were issued or renewed prior to October 1, 1992.

FN1. This information is based on a document that was made available to the Senate Subconference Committee on Health and Human Services. The document entitled "Provider Specific Surcharge FY 93," was attached to the affidavit of David Giel, a legislative analyst with the Minnesota Senate Counsel and Research Office.

Having found that section 147.01, subd. 6 applies to appellants, I would further find that it does not do so retroactively. "A retrospective law, in the legal sense, is one which takes away or impairs vested rights acquired under existing laws, or creates a new obligation and imposes a new duty, or attaches a new disability, in respect of transactions or considerations already past." Cooper v. Watson, 290 Minn. 362, 369, 187 N.W.2d 689, 693 (1971)(quoting 50 Am.Jur., Statutes, § 476). I would read section 147.01, subd. 6(l), requiring physicians whose licenses were renewed or issued between April 1 and October 30 of 1992 to be billed for the surcharge by November 15 of 1992, as an administrative provision bearing on the order of payment of a financial obligation. In other words, that a physician's license was issued or renewed between April 1 and September 31 of 1992 is simply an "antecedent" fact which the section draws upon for its operation. Such antecedent facts do not render a statute retroactive. Reynolds v. United States, 292 U.S. 443, 449, 54 S.Ct. 800, 803, 78 L.Ed. 1353 (1934).

Indeed, to the extent that the payment of the surcharge is associated at all with the issuance or renewal of a license, the statute provides that a license will not be renewed if the surcharge is not paid. Thus, because the 1992 licenses had already been renewed, it was the 1993 licenses that would be affected. It was made clear during oral argument that the licenses issued or renewed between April 1 and September 31,

1992 would not be affected in any way by nonpayment of the surcharge. Thus, section 147.01, subd. 6 impairs no "vested right" and does not operate retroactively.

I would also find that the statute violates no due process rights. An individual's procedural due process rights are violated by a statute only if it divests or affects a private vested interest. Smith v. City of Owatonna, 450 N.W.2d 309, 311 (Minn.1990). As discussed above, section 147.01, subd. 6 has no effect on a physician's current license. Rather, the statute affects renewal of a license. However, I would find an expectation in the renewal of a license not to be a vested property interest. Thus, operation of the statute would not violate due process.

Appellants also argue that the surcharge violates constitutional state and federal equal protection guarantees. Equal protection challenges to legislation which makes classifications based on social or economic criteria are examined under a rational basis standard. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985); see also Skeen v. State, 505 N.W.2d 299, 316 (Minn. 1993). Legislative classifications will be upheld if: 1) the challenged legislation has a legitimate purpose; and 2) it was reasonable for the legislature to believe that the use of the *374 challenged classification would promote that purpose. Id. Appellants do not contend the state's interest--raising money for the general fund--is not legitimate. Rather, appellants contend no rational basis exists for dividing the physicians into two classes and then applying this statute against physicians born between April 1 and September 30. Of this argument, the court of appeals said:

> The purpose of the surcharge is to generate funds to attract federal matching funds for Medicaid. The surcharge is assessed on all physicians. The division of Minnesota

physicians into two groups for administrative convenience in billing is rationally related to a legitimate state interest.

Ubel v. State, No. C7-94-300, 1994 WL 284973, unpub. op. at 2 (Minn.App. June 28, 1994). I find this reasoning sound and would hold that appellants' rights to equal protection under both the state and federal constitutions are not violated.

I would affirm the court of appeals' holding that appellants owed the State Board of Medical Practice the $400 license surcharge on December 15, 1992 as required by section 147.01, subd. 6 (1992).

STRINGER, Justice (concurring).

I join in the concurrence of Justice Tomljanovich.

PAGE, Justice (dissenting).

I respectfully dissent, yet I agree with much of the reasoning of the majority opinion. I agree that Minn.Stat. § 147.01, subd. 6 (1992) is clear and unambiguous, that the plaintiff class of physicians is liable for the surcharge in 1992 only if the statute is given retroactive effect, and that there is no basis for giving the statute retroactive effect. I further agree that the 1993 amendment, which modifies the substance of the 1992 law and limits retroactive application to pending cases, is suggestive of special legislation that improperly targets the plaintiff class for challenging the State's unlawful exaction of a surcharge. Thus, I would not impute a benign and legitimate purpose to the law.

GARDEBRING, Justice (dissenting).

I join in the dissent of Justice Page,

ANDERSON, Justice (dissenting).

I join in the dissent of Justice Page.

END OF DOCUMENT

STATE OF MINNESOTA

IN SUPREME COURT

C7-94-300

Dr. Frank A. Ubel, M.D., and Dr. Howard Anderson, M.D., each individually and as members of a class of persons similarly situated, plaintiffs/class representatives, petitioners,

Appellants,

vs.

State of Minnesota, et al.,

Respondents.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition for rehearing filed in the above entitled matter be, and the same is, denied.

Dated: July 29, 1996

BY THE COURT:

s/s

Mary Jeanne Coyne
Associate Justice

Not Reported in N.W.2d
(Cite as: 1994 WL 284973 (Minn.App.))

NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Frank A. UBEL, M.D., and Dr. Howard Anderson, M.D., each individually and as members of a class of persons similarly situated, plaintiffs/class representatives, Appellants,

v.

STATE of Minnesota, et al., Respondents.

No. C7-94-300.

Court of Appeals of Minnesota.

June 28, 1994.

Review Granted Sept. 16, 1994.

Appeal from District Court, Hennepin County; Harvey C. Ginsberg, Judge.

Kay Nord Hunt, Phillip A. Cole, Terrance W. Moore, Lommen, Nelson, Cole & Stageberg, Minneapolis, for appellants.

Hubert H. Humphrey, III, Atty. Gen., Alison E. Colton, Asst. Atty. Gen., St. Paul, for respondents.

Considered and decided by PARKER, P.J., and CRIPPEN and PETERSON, JJ.

UNPUBLISHED OPINION

PARKER, Judge.

*1 A group of physicians appeal from the district court's grant of summary judgment, which was based on a determination that the statute in question is not retroactive. We affirm.

DECISION

Summary judgment is proper when there are no genuine issues of material fact and a party is entitled to judgment as a matter of law. Minn.R.Civ.P. 56.03. The material facts here are undisputed and therefore the only remaining issues are questions of law. The interpretation of a statute is a question of law, which this court considers de novo. Hibbing Education Ass'n v. Public Employment Relations Bd., 369 N.W.2d 527, 529 (Minn. 1985).

The physicians argue that application of the statute to them is improper because it is retroactive. Generally, a statute is presumed to have prospective effect. Cooper v. Watson, 290 Minn. 362, 369, 187 N.W.2d 689, 693 (1971). No statute is to be applied retroactively unless "clearly and manifestly so intended by the legislature." Minn.Stat. § 645.21 (1992).

A retroactive law is one that takes away or impairs vested rights acquired under previously existing laws, creates a new obligation, imposes a new duty, or attaches a new disability to a transaction in the past. Cooper, 290 Minn. at 369, 187 N.W.2d at 693 (citations omitted). A law is not considered retroactive merely because some of the facts on which a subsequent action depends are drawn from a time prior to its

enactment. Proetz v. Minnesota Bd. of Chiropractic Examiners, 382 N.W.2d 527, 533 (Minn.App.1986), pet. for rev. denied (Minn. May 16, 1986). (Citing Reynolds v. United States, 292 U.S. 443, 449, 54 S.Ct. 800, 803 (1934).

The 1992 statute reads in relevant part as follows:

Subd. 6. License surcharge. In addition to any fee established under section 214.06, the board shall assess an annual license surcharge of $400 against each physician licensed under this chapter as follows:

(1) a physician whose license is issued or renewed between April 1 and September 30 shall be billed on or before November 15, and the physician must pay the surcharge by December 15; and

(2) a physician whose license is issued or renewed between October 1 and March 31 shall be billed on or before May 15, and the physician must pay the surcharge by June 15.

The board shall provide that the surcharge payment must be remitted to the commissioner of human services to be deposited in the general fund under section 256.9656. The board shall not renew the license of a physician who has not paid the surcharge required under this section.

Minn.Stat. § 147.01, subd. 6 (1992).

Subdivision 6 is unequivocal in imposing an annual license surcharge "against each physician licensed under this chapter." This is not a retroactive application of statute. The statute plainly applies to all physicians currently licensed under Minnesota law. The effective date of the statute was set as October 1, 1992.

The physicians argue that the collection of a surcharge against the group of physicians defined in subdivision 6(1) is a retroactive application because this class had already paid its

license fees for 1992 and only afterward was required to pay the surcharge.

*2 The physicians misconstrue the statute's purpose in dividing Minnesota physicians into two groups. Subdivisions 6(1) and (2) indicate merely the manner and time of billing for administrative convenience, not an attempt to apply the surcharge retroactively. It applies specifically in the present, to "each physician licensed under this chapter."

Further, we note that application of the surcharge does not impair a vested right of these physicians in any way. If a physician from this group failed to pay the surcharge, that failure to pay would not affect the current license: the physician would be free to practice medicine in good standing until the next license renewal date. Failure to pay jeopardizes renewal of the license, but affects no current, vested right to practice medicine. Therefore, we conclude, as did the district court, that imposition of the surcharge to this group of physicians is not a retroactive application of the statute.

Even if application of this statute were viewed as retroactive, however, we conclude that the legislature (creating a presumption against retroactivity unless clearly intended by the legislature), intended such retroactivity. See Minn.Stat. § 645.21 (1992). Inasmuch as the vast majority of Minnesota legislation is effective August 1 of each year, the selection of October 1 as the effective date for this statute is significant. The statute divides physicians into two groups, those whose licenses are renewed between April 1 and September 30 and those whose licenses are renewed between October 1 and March 31. Billing for the first group was to be done by November 15 and payment made by December 15. The October 1 effective date immediately follows the end of the licensing period for those in the first group. This structure

indicates the legislature, clearly intended the statute to apply to those physicians who had renewed or been issued their licenses as of October 1, 1992. Therefore, such application is valid because the legislature clearly and manifestly intended it.

The group of physicians also argues that application of the statute to them violates constitutional guarantees of due process and equal protection. First, we note that the legislative process itself constitutes due process. The physicians have not shown how the legislature's passage of this statute violated their due process rights.

A statute does not violate equal protection principles if it is rationally related to a legitimate state interest. Lienhard v. State, 431 N.W.2d 861, 866-67 (Minn.1986). The purpose of the surcharge is to generate funds to attract federal matching funds for Medicaid. The surcharge is assessed on all physicians. The division of Minnesota physicians into two groups for administrative convenience in billing is rationally related to a legitimate state interest.

Affirmed.

END OF DOCUMENT

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

Dr. Frank A. Ubel, M.D. and Dr. Howard Anderson M.D., each individually and as members of a class of persons similarly situated

Plaintiffs/Class Representatives,

-vs-

State of Minnesota, Minnesota Board of Medical Practice, and Minnesota Department of Human Services.

Defendants.

Court File No. 93-1114

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above-entitled matter came on for hearing before the Honorable Harvey C. Ginsberg on September 2nd, 1993. Terrance W. Moore, Esq., appeared on behalf of Plaintiffs. Alison E. Colton Esq., appeared on behalf of Defendants. Based upon the briefs, records, and proceedings herein, this Court issues the following:

CONCLUSIONS OF LAW

1. The Minnesota Legislature intended the physicians' license surcharge embodied in Minnesota Statute § 147.01, subd. 6 to be assessed and collected in 1992 from physicians whose licenses to practice medicine were issued or renewed between April 1, 1992, and September 30, 1992, and who held an active license on October 1, 1992.

2. Application of Minnesota Statute § 147.01, subd. 6 and the subsequent amendment (chapter 1, 1993 Minn. Laws First Special Session, art. 5, §§ 6, 7, 12, 13, 129 and 135) to the plaintiffs is not a retroactive operation of the Statute.

3. Minnesota Statute § 147.01, subd. 6, and the subsequent amendment is rationally related to a legitimate governmental purpose and does not violate equal protection principles.

ORDER

1. Plaintiffs' motion for summary judgment is denied.
2. Defendants' motion for summary judgment is granted.
3. The Memorandum of Law attached herein is incorporated by reference.

LET JUDGMENT BE ENTERED ACCORDINGLY,

By The Court

Dated: 11/29/93

s/s
Judge Harvey C. Ginsberg

FINDINGS OF FACT

In late 1991, the Minnesota Legislature enacted Minnesota Statute § 147.01, subd. 6. (1992). That section states:

> Subd. 6. **License surcharge.** In addition to any fee established under section 214.06, the board [of Medical Practice] shall assess an annual license surcharge of $400 against each physician licensed under this chapter as follows:
>
> (1) a physician whose license is issued or renewed between April 1 and September 30 shall be billed on or before November 15, and the physician must pay the surcharge by December 15; and
>
> (2) a physician whose license is issued or renewed between October 1 and March 31 shall be billed on or before May 15, and the physician must pay the surcharge by June 15.
>
> The board shall provide that the surcharge payment must be remitted to the commissioner of human services to be deposited in the general fund under section 256.9656. The board shall not renew the license of a physician who has not paid the surcharge required under this section. The board shall promptly provide to the commissioner of human services upon request information available to the board and specifically required by the commissioner to operate the provider surcharge program. The board shall limit the surcharge to physicians residing in Minnesota and the states contiguous to Minnesota upon notification from the commissioner of human services that the federal government has approved a

waiver to allow the surcharge to be applied in that manner.

Minn. Stat. § 147.01, subd. 6. (1992).

The law became effective October 1, 1992. 1992 Minn. Laws, ch. 513, art. 7, § 137. In November 1992, defendant, Minnesota Medical Practice Board ("the Board") issued surcharge invoices to physicians whose licenses were issued or renewed between April 1, 1992, and September 30, 1992, and who held active licenses on October 1, 1992. The invoice stated that the payment was due on December 15, 1992. Defendant, Minnesota Department of Human Services collected the billed amounts and deposited them into the general fund of the State of Minnesota.

Plaintiffs are the class of all physicians whose licenses to practice medicine in Minnesota were issued or renewed between April 1, 1992, and September 30, 1992, who were assessed and paid the surcharge under Minn. Stat. § 147.01, subd. 6, effective October 1, 1992. (Order certifying class, filed March 25, 1993). On January 11, 1993, Plaintiffs served a Complaint against Defendants alleging that the imposition of the surcharge on plaintiffs constituted an improper application of Minn. Stat. § 147.01, subd. 6. Plaintiffs seek a refund of the payments collected by Defendants.

Defendants filed a Rule 12.02(e) motion to dismiss. Plaintiff filed a motion for summary judgment. By agreement of the parties, both motions were converted into ones for summary judgment. (Transcript March 25, 1993 hearing).

While these motions were pending, the Legislature passed an amendment "clarifying" its intent regarding the application of Minn. Stat. § 147.01, Subd. 6. (1992). ch. 1, 1993 Minn. Laws First Special Session, art 5 §§ 6, 7, 12, 1, 129, and 135 (May 27, 1993).

The portions of that Amendment relevant to this case state:

> Sec. 6. Minnesota Statute 1992, section 147.01, subdivision 6, is amended to read:
>
> Subd. 6. [LICENSES SURCHARGE.] In addition to any fee established under section 214.06, the board shall assess an annual license surcharge of $400 against each physician licensed under this chapter. The surcharge applies to a physician who is licensed as of or after the effective date of this section in Laws 1992, and whose license is issued or renewed on or after April 1, 1992, and is assessed as follows:
>
> (1) a physician whose license is issued or renewed between April 1 and September 30 shall be billed on or before November 15, and the physician must pay the surcharge by December 15; and
>
> (2) a physician whose license is issued or renewed between October 1 and March 31 shall be billed on or before May 15, and the physician must pay the surcharge by June 15.
>
> . . . .
>
> Sec. 129. [LEGISLATIVE INTENT.]
>
> Sections 6 and 15, paragraph (b); and the amendment to paragraph (a), clause (3), in section 123, are intended to clarify, rather than to change, the original intent of the statutes amended.
>
> . . . .

Sec. 135. [EFFECTIVE DATES.]

Subd. 7. Sections 6 and 129 are effective the date following final enactments and apply to cases pending or brought on or after their effective date.

The parties supplemented their briefs to address issues that were raised by this amendment.

MEMORANDUM OF LAW

Summary Judgment Standard

Summary judgment is proper when there are no genuine issues of material fact and a party is entitled to judgment as a matter of law. Minn. R. Civ. P. §56.03. Where a statute is open to at least two interpretations, the court must ascertain the legislatures intent. Northern States Power Co. v. Donovan, 258 Minn. 125, 103 N.W.2d 126 (1960). Similarly, whether a statute was enacted in conformity to the constitution is for the court. Board of Supervisors v. Heenan, 2 Minn. 330 (1858).

The material facts of this case are not in dispute and both parties have moved for summary judgment. Plaintiffs allege that the Minnesota Legislature did not intend the surcharge to be assessed in 1992 against physicians whose licenses were issued or renew between April 1, 1992 and September 30, 1992, and even if that was their intent, such application constitutes an impermissible retroactive operation of the statute. Each of these issues will be addressed in turn.

The primary object in statutory interpretation is to ascertain and effectuate the intention of the legislature. Minn. Stat. § 645.16 (1992); Stawikowski v. Collins Elec. Const. Co., 289 N.W.2d 390, 395 (1979). Where the intention of the legislature is clearly mainfested by plain unabiguous language, no construction in necessary or permitted. Lenz v. Coon Creek Watershed Dist., 278 Minn. 1, 153 N.W.2d 209 (1967). Where, however, there are two reasonable interpretations of the statute, the court may view the statute in light of the conditions and circumstances surrounding its enactment to ascertain the legislative intent. Mankato Citizens Tel. Co. v. Commissioner of Taxation, 275 Minn. 107, 145 N.W.2d 313 (1966).

The statute at issue lends itself to two reasonable interpretations. The Legislature in drafting Minn. Stat. §147.01, subd. 6 divided the group of physicians to pay the surcharge into two categories with separate assessment and payment dates based upon when their license was issued or renewed. When it divided the group of physicians it listed the plaintiffs' group first. The logical interpretation of listing the plaintiffs' group before the other group of physicians is that the Legislature intended the Plaintiffs to be the first group to be assessed the surcharge. However, plaintiffs argue that the Legislature intended that the group of physicians listed in subpart 2 of Minn. Stat. 147.01, subd. 6 should be the first to pay the surcharge. Plaintiffs base their contention on the fact that the effective date of the Statute is October 1, 1992, and that the statute as applied by defendants operates in an impermissible retroactive manner.

Where a statute is ambiguous, the court may refer to the legislative history surrounding its enactment. Minn. Stat. § 645.16(7) (1992). In hearings conducted by the 1992 Legislature regarding provider surcharges, including physician surcharges, legislators were specifically informed of the operation of and amount of revenue to be derived from provider surcharges in fiscal 1993 (July 1, 1992 through June 30, 1993).

In response to questions from Senators regarding the amount of revenue generated by the license surcharge, David Giel, a legislative analyst with the Minnesota Senate Counsel and Research Office stated:

> Mr. Chairman, on the top of the first page payments from providers, the last one listed there is the physician license surcharge of $600 per year effective 10-1-92. Half of the physicians were billed in November and the other half billed in the spring, in May and these estimates are based on obtaining the

> waiver so that we would just be billing the physicians in the 5 state area and that would generate revenue of 6.476 million dollars.

(Minnesota Senate Health and Human Services Subcommittee of Senate Finance Committee, 77th Minn. Leg., March 27, 1992).

The above referenced document entitled PROVIDER SPECIFIC SURCHARGES listed the amounts to be collected from physicians between October 1, 1992, to June 30, 1993, at 6.543 million dollars. (See Defendant's March 18, 1993, Memorandum App. 3). The only way to collect this level of revenue in fiscal 1993 would be to assess the surcharge against the plaintiffs (physicians whose licenses were renewed or issued between April 1, 1992, and September 30, 1992.)[1] The legislative history shows that the Legislators understood that proposed revenue could only be collected by imposing the surcharge on plaintiffs in 1992.

Moreover, any ambiguity in Minn. Stat. § 147.01, subd. 6 was removed when the legislature passed the Omnibus Health and Human Services Act of May 27, 1993. (ch. 1, 1993 Minn. Laws First Special Session, art. 5 §§ 6, 7, 12, 13, 129, and 135). In amending Minn. Stat. § 147.01, subd. 6 the legislature made it clear that the "surcharge applies to a physician who is licensed as of or after the effective date of this section in Laws 1992, . . ." This language unequivocally provides for the 1992 surcharge assessment and collection from the plaintiffs.

It is well established that the legislature may clarify existing laws. Pirkov-Middaugh v. Gillette Hosp., 495 N.W.2d 608 (Minn. 1993); American Bank of Greenweld v.

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[1] While the actual amount of the physician license surcharge was reduced from $600 to $400 during the legislative process the method of assessing and collecting the surcharge remains identical with that described in the above committee hearings.

Herickhoff, 485 N.W.2d 702 (Minn. 1992); Nardini v. Nardini, 414 N.W.2d 184 (Minn. 1987). Similar to the statute in Gillette, Section 129 of the 1993 amendment states that the Legislature's intent was to "clarify, rather than to change, the original intent of the statutes amended," and that the amendment was to apply to pending cases. (ch. 1, 1993 Minn. Laws First special Session, art. 5 §§ 129 and 135). Such a clarification amendment governs the decision in cases where no final judgment has yet been entered. See Gillette Hosp., 495 N.W.2d at 611; Holen v. Minneapolis-St. Paul Metropolitan Airport Comm'n, 250 Minn. 130, 136, 84 N.W.2d 282, 287 (1957).

While a clarification is permitted, such an amendment is unconstitutional where it would divest a privately vested right. Gillette Hosp., 495 N.W.2d at 611. This rule is identical to those governing retroactive statutes. Cooper v. Watson, 290 Minn. 362, 369, 187 N.W.2d 689, 693 (1971) (a retroactive law is one which "takes away or impairs vested rights acquired under existing laws, or creates new obligations or imposes a new duty, or attaches a new disability, in respect of a transaction or consideration already past.") While it is clear that the Legislature intended the surcharge to be assessed agains: the plaintiffs in 1992, the second issue that must be addressed is whether the assessment unconstitutional divest a vested right.

Both parties rely on the analysis performed in In re Estate of Hanson, 451 N.W.2d 364 (Minn. Ct. App. 1990) and In re Estate of O'Keefe, 354 N.W.2d 531 (Minn. Ct. App. 1984) in arguing the constitutionality of Minn. Stat. § 147.01, Subd. 6. In O'Keefe, the court found that a statute permitting the state to recover medical assistance benefits was not retroactive as applied to the plaintiffs because the recipient died after the effective date of the amended statute. When the recipient originally applied for benefits, homestead property was exempted from claims for medical assistance liens. The statute

was amended prior to the recipients death to permit the recovery of medical assistance benefits from the recipients homestead. Following the recipients death, the county filed a lien against her homestead. The personal representative of her estate objected, arguing that application of the amended statute was impermissible retroactive. The court held that it was not retroactive; the operative fact being that the recipient died before the statute was amended.

The opposite result occurred in Hanson but a similar analysis was used. In Hanson, the court denied the state's attempt to recover medical assistance benefits paid to a spouse who died before the statute was amended to permit such a recovery. Distinguishing the case from O'Keefe, the court noted that the operative fact in determining whether or not the law was retroactive was whether the recipient died prior to the time the statute was amended.

In each of the for-mentioned case the triggering event was whether the recipient of the benefits had died prior to the effective date of the statute. The reason the courts looked at that point is to see what rights, if any, had vested in the heirs of the recipient. Where the statute became effective before the death of the recipient, the plaintiffs had nothing more than a mere expectation of receiving the estate. Nothing had vested in the "heirs" of the recipient for the simple reason that the living have no heirs. O'Keefe, 354 N.W.2d at 534. In Hanson, the very opposite is true. The effective date of the statute took place after the recipient had died (and the property had vested in the plaintiffs). Thus, the court looks to see what right a plaintiff holds at the time of the triggering event and to see if those rights are impaired by the application of the statute.

Using that analysis in the present case, the plaintiffs here enjoyed no right which was divested or impaired by application of the surcharge in 1992. It first must be clarified what it is Minnesota Statute § 147.01, subd. 6 and the

subsequent amendment does and what it does not do. The amended statute requires physicians who held their license on October 1, 1992, to pay a surcharge by December 15, 1993. If the physicians fails to pay the surcharge, their licenses will not be renewed the following year. However, failure to pay the surcharge does nothing to affect the right to practice medicine for the duration of the license (remainder of the license year). Thus a physician whose license was renewed or issued on April 1, 1992 could have refused to pay the 1992 surcharge and continued to practice medicine until April 1, 1993. The statute does not require revocation or surrender of the renewed or issued license for failure to pay the surcharge. It merely prohibits the renewal of that license the following year (1993-1994). By assessing and collecting the surcharge from plaintiffs in November and December, the surcharge is collected prospectively on the future license. Stated another way, the surcharge is merely collected well in advance of license renewal. Therefore, contrary to plaintiffs contentions the surcharge imposes no new obligation on their 1992-1993 medical license.

Plaintiffs argue that whether the surcharge affects an existing license or its ability to renew its license is irrelevant because their ability to practice medicine is at some point impaired. However, plaintiffs have no vested right to the terms and conditions of their license renewal. A right is not vested unless it is something more than a mere expectation, based on an anticipated continuance of existing laws. Olsen v. Special Sch. Dist. No. 1, 427 N.W.2d 707, 711 (Minn. Ct. App. 1988). When Plaintiffs' renewed their license in 1992, they had nothing more than a mere expectation that the terms and conditions of license renewal would remain unchanged for 1993. Hoping that there will be no changes for the privilege to practice ones profession does not transform into a right. The legislature which creates a property interest may rescind it. Gattis v. Gravett, 806 F.2d 778, 781 (8th Cir. 1986). A

fortoiri, the legislature may also change the conditions for continued enjoyment of that privilege. In this case, the payment of a $400 surcharge.

Plaintiff also claims that the surcharge as assessed violates equal protection. In the area of economic and social welfare, a state does not violate the Equal Protection Clause if the statute as enacted is rationally related to a legitimate state interest. Leinhard v. State, 431 N.W.2d 861, 866 (Minn. 1986); Dandridge v. Williams, 397 U.S. 471, 485 (1970). Under this standard, the court must address two questions:

> (1) Does the challenged legislation have a legitimate purpose? and
>
> (2) was it reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose?

Lienhard, 431 N.W.2d at 866. Rational-basis review in equal protection analysis 'is not a license for courts to judge the wisdom, fairness or logic of legislative choices.'" FCC v. Beach Communication, Inc., 508 U.S. ___, ___ (1993). If the classification has some reasonable basis it does not offend the constitution because it results in some inequality. Tibbetts v. Leech Lake Reservation Business, 397 N.W.2d 883, 890 (Minn. 1986).

Plaintiffs do not challenge the legitimacy of the States purpose in collecting the surcharge. Instead, plaintiffs claim that the method chosen unfairly discriminates against them. To the contrary, the Amendment requires all physicians in Minnesota to pay the surcharge. The Statute simply divides the class to more efficiently assess and collect the surcharge. The Legislature may have believed it easier to assess and collect the surcharge from half the group then all of them at one time. The method for dividing the class is rationally

related to this purpose. The Amendment passes rational basis scrutiny.

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT
Case Type: Class Action
Court File No.

Dr. Frank A. Ubel, M.D., and Dr. Howard Anderson, M.D., each individually and as members of a class of persons similarly situated,

Plaintiffs/Class Representatives

vs.

CLASS ACTION COMPLAINT

State of Minnesota, Minnesota Board of Medical Practice, and the Minnesota Department of Human Services,

Defendants.

Plaintiffs, as and for their Complaint against Defendants, state and allege as follows:

PARTIES AND CLASS ALLEGATIONS

1. Plaintiffs are physicians in the State of Minnesota whose licenses to practice medicine under Minn. Stat. Sec. 147 were issued or renewed between April 1 and September 30, 1992. Plaintiffs bring this action as a class action pursuant to Minnesota Rules of Civil Procedure 23 on behalf of all physicians in the State of Minnesota whose licenses were issued or renewed between April 1, 1992 and September 30, 1992 and who were assessed the Medical Care Surcharge (hereinafter "Surcharge").

2. Defendant Minnesota Board of Medical Practice has its office at 2700 University Avenue West, Suite 106, St. Paul, Minnesota 55114-1080. The Minnesota Board of Medical Practice is responsible for administering the licensure of physicians in the State of Minnesota and billing Plaintiffs for the Surcharge.

3. Defendant Minnesota Department of Human Services keeps an office at 444 LaFayette Road, St. Paul, Minnesota 55155-9902. The Department of Human Services is responsible for receiving the Surcharge and paying the funds into the general fund of the State of Minnesota.

4. Defendant State of Minnesota (hereinafter "the State") is responsible for receiving the Surcharge into its general fund. The State is made a defendant pursuant to the provisions of Minnesota Statutes Sec. 3.736 and because it is in receipt of funds without statutory authorization.

5. In accordance with Minnesota Statute Sec. 3.736, subd. 5, on January 11, 1993, and within 180 days after receiving the injuries herein alleged, Plaintiffs duly served on the Attorney General of the State of Minnesota a written notice and claim, stating the time, place, circumstances and amount of compensation demanded by the claim.

6. This action is properly maintained as a class action for the following reasons:

a. On information and belief the class consists of more than 4000 physicians and is, consequently, so numerous that the joinder of all members is impractical;

b. There are questions of law and fact common to the class, including whether Defendants' conduct in assessing and collecting the Surcharge was authorized by statute;

c. The claims of the representative parties are typical of the claims of the class;

d. The representative parties will fairly and adequately protect the interest of the class;

e. The prosecution of separate actions by or against individual members of the class will create a risk of (1) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for Defendants and (2) adjudication with respect to individual members of the class would, as a practical matter, be dispositive of the interests of the other members not party to the adjudications;

f. The questions of law and fact common to the members of the class dominate over any questions affecting only individual members and a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

7. During its regular session in 1992 the Minnesota legislature amended Minnesota Statutes 1990, Section 147.01, effective October 1, 1992, to add a subdivision (hereinafter the "Amendment") which reads as follows:

> Subdivision 6. License Surcharge. In addition to any fee established under Section, 214.06, the board shall assess an annual license surcharge of $400.00 against each physician licensed under this chapter as follows:
>
> (1) A physician whose license is issued or renewed between April 1 and September 30 shall be billed on or before November 15 and the physician must pay the surcharge by December 15; and
>
> (2) A physician whose license is issued or renewed between October 1 and March 31 shall be billed on or before May 15, and the physician must pay the surcharge by June 15. The board shall provide that the surcharge payment must be remitted to the commissioner of human services to be deposited in the general fund under section 256.9656. The board shall not renew the license of a physician who has not

> paid the surcharge required under this section. The board shall promptly provide to the commissioner of human services upon request information available to the board and specifically required by the commissioner to operate the provider surcharge program. The board shall limit the surcharge to physicians residing in Minnesota and the states contiguous to Minnesota upon notification from the commissioner of human services that the federal government has approved a waiver to allow the surcharge to be applied in that manner.

8. Defendants made improper and unlawful retrospective application of the Amendment, by assessing the Surcharge on physicians whose licenses to practice medicine were issued or renewed before the effective date of the Amendment, as further described in Paragraphs 8-13 of this Complaint.

9. Defendants improperly and without statutory authorization demanded payment of the Surcharge from physicians whose licenses were issued or renewed prior to the effective date of the Amendment. (hereinafter the "Demand").

10. Defendants made the Demand on the members of Plaintiff class, who are approximately 4000 physicians whose licenses were issued or renewed between April 1, 1992 and September 30, 1992.

11. When making the Demand, Defendants threatened Plaintiffs with various penalties and interest charges including but not limited to a statement that the Minnesota Board of Medical Practice "cannot renew the license of a physician who has not paid the surcharge."

12. When making the Demand, Defendants misrepresented the law of the State of Minnesota by stating:

the law requires that the surcharge payment be remanded to the Commissioner of Human Services and deposited in the general fund. The Board cannot renew the license of a physician who has not paid the surcharge. Minnesota law requires that a $400.00 surcharge be assessed as follows:

1. A physician's license which is issued or renewed between April 1 and September 30 shall be billed on or before November 15, the physician must pay the surcharge by December 15; and

2. A physician whose license is issued or renewed between October 1 and March 31 shall be billed or before May 15, and the physician must pay the surcharge by June 15.

and failing to state that said law was not effective until October 1, 1992.

13. Defendants never informed Plaintiffs that the effective date of the Amendment was October 1, 1992.

14. As a result of Defendants' improper Demand, threats and misrepresentations, approximately 4000 physicians were each induced to pay Defendants a Surcharge of $400.00.

15. Defendants are in receipt of approximately $1.6 million from Plaintiffs, which was received by Defendants without statutory authorization.

16. Plaintiffs are entitled to a refund of the sums which were demanded and received by Defendants without statutory authorization.

WHEREFORE, Plaintiffs pray for judgment against the Defendants jointly and severally, as follows:

1. Declaring this action to be a proper class action.

2. Awarding Plaintiffs damages in an aggregate amount in excess of $50,000.00.

3. Awarding Plaintiffs their costs and disbursements incurred in this litigation.

4. Granting such other and further relief as this Court may deem just and equitable.

LOMMEN, NELSON, COLE & STAGEBERG, P.A.

Dated: 12 January 93

By s/s _____
Phillip A. Cole, I.D. No. 17802
Terrance W. Moore, I.D. No. 194748
Attorneys for Plaintiffs
1800 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 339-8131

ACKNOWLEDGMENT

If the requirements of good faith pleading set forth in M.S. 549.21 are breached, the undersigned acknowledges that the court may award costs, including reasonable attorney's fees to opposing parties.

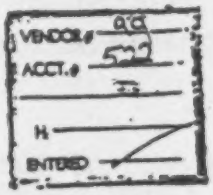
s/s _____
Phillip A. Cole

MINNESOTA DEPARTMENT OF HUMAN SERVICES

Medical Assistance

Medical Care Surcharge Fund

INVOICE



INVOICE# 27035

AMOUNT DUE: $ 400.00 DUE DATE: 15-DEC-1992

This is your Medical Care Surcharge Fund assessment (license surcharge).

Inquiries regarding this invoice may be sent to the address shown at the top of this invoice, or call the number listed below. Minnesota law requires that a penalty and interest be applied to overdue amount. The penalty is assessed on the day after the surcharge is due, and each thirty (30) days thereafter. Interest accrues on the surcharge and penalty, beginning the day after payment is due.

QUESTIONS REGARDING REMITTANCE: Metro area, call 296-8607
Greater MN, call 1-800-657-3762

AUTHORITY: 1992 Minnesota Laws, Chapter 513, Article 7, Section 9

851

KEEP THE ABOVE PORTION FOR YOUR RECORDS

BEST AVA

NOTICE

The 1992 Legislature enacted an annual license surcharge of $400 for physicians. This surcharge is applicable to all physicians licensed by the State of Minnesota. The law requires that the surcharge payment be remitted to the commissioner of human services and deposited in the general fund. The Board cannot renew the license of a physician who has not paid the surcharge. Minnesota law requires the $400 surcharge to be assessed as follows:

1. A physician whose license is issued or renewed between April 1 and September 30 shall be billed on or before November 15, and the physician must pay the surcharge by December 15; and

2. A physician whose license is issued or renewed between October 1 and March 31 shall be billed on or before May 15, and the physician must pay the surcharge by June 15.

PENALTY AND INTEREST

All unpaid surcharge amounts will be assessed a penalty beginning the day after payment is due. An additional penalty will be assessed each 30 days thereafter, up to 24% in the aggregate. Interest accrues on the surcharge and the penalty, beginning the day after payment is due.

Any questions concerning remittance should be directed to the Medical Care Surcharge Unit-DHS, 444 Lafayette Road, St. Paul, MN 55155-3850. Metro area call 296-6607. Greater Minnesota call 1-800-657-3762.

LABLE COPY

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

102 STATE CAPITOL
ST. PAUL, MN 55155

HUBERT H. HUMPHREY, III
ATTORNEY GENERAL

TELEPHONE- (612) 296-6196
FACSIMILE- (612) 296-4193

March 30, 1993

Arthur L. Arnold, M.D.
Twin Ports VA Outpatient Clinic
3520 Tower Avenue
Superior, Wisconsin 54880

Dear Dr. Arnold:

Thank you for contacting my office regarding the recently enacted physician license surcharge law, Minnesota Statutes section 147.01, subd. 6 (1992).

As you know, the Minnesota Legislature in 1992 assessed a $400 surcharge on all medical licenses issued by the Minnesota Board of Medical Practice (Board). The law requires that physicians be invoiced 30 days prior to the due date; that physicians be billed in two groups, according to the date of license renewal; that the surcharge be applied to physicians living in Minnesota or in contiguous states; that interest and penalties be imposed on overdue amounts; and, that the Board cannot renew a medical license until any delinquent surcharge amount (including interest and penalties) has been paid. The law designated the Board to initiate the invoices and the Department of Human Services to collect, impose interest and penalties, and to take court action where

necessary to collect the surcharge. The two groups of physicians are billed as follows:

> Group 1: Physicians whose licenses are issued or renewed between April 1 and September 30, will be billed on or before November 15, for a due date of December 15. (Group 1.)
>
> Group 2: Physicians whose licenses are issued or renewed between October 1 and March 31, will be billed on or before May 15, for a due date of June 15. (Group 2.)

Invoices for Group 1 were sent by the Board to physicians at the address of record as of November 1, 1992. For this group, the surcharge applied only to physicians who continued to be licensed on the effective date of the law, October 1, 1992. Thus, if a physician's license was cancelled, revoked, or suspended, or the physician died prior to October 1, 1992, the surcharge would not apply.

If you fail to renew your Minnesota license, resign your Minnesota license, either at or before its renewal date, you do not incur the surcharge liability immediately following that statutory renewal period. The event that triggers the surcharge liability is the issuance or renewal of your license, even if your license is cancelled or you are granted emeritus status after that date. The law does not contain any provisions for waiver, exclusion or exemption, and neither the Board nor the Department has the authority to grant any waivers, exclusions or exemptions.

If you are in Group 1 and had an active license on October 1, 1992, there is no action you can take to avoid surcharge liability.

To avoid future surcharge liability, you may wish to exercise one of the following options:

1. You may allow your license to lapse through non-renewal; or

2. You may resign your license; or

3. If you are completely retired from the practice of medicine and do not see patients or prescribe, you may request emeritus registration.

However, taking one of these options does not relieve you of surcharge liability for any license issuance or renewal which has already occurred.

It is anticipated that the Legislature will review the surcharge legislation in the 1993 session (January to May). In addition, some physicians have sued the state claiming that the application of the law to physicians renewing between April and September, 1992 was improper. These physicians are seeking a refund of the license surcharge amount paid by Group 1 physicians.

I hope this information is helpful to you.

Best regards,

s/s
HUBERT H. HUMPHREY III
Attorney General

MINNESOTA BOARD OF MEDICAL PRACTICE
2700 University Avenue West, #106 St. Paul. MN 55114-1080
(612) 642-053

SURCHARGE INFORMATION

This information is being sent to all physicians who have written the Minnesota Board of Medical Practice (Board) or the Minnesota Department of Human Services (Department) about the $400 medical license surcharge. Please accept our apologies for not sending an earlier response. There were several issues which needed resolution prior to our response. Several more issues are pending as outlined at the end of this article. The Board and the Department are charged with implementing the legislation in an equitable manner within the limits of the law. The objective of this correspondence is twofold: 1) to explain the surcharge legislation and its implications and 2) to offer the opportunity to resign your medical license, if so desired.

BACKGROUND

The Summer, 1992 Minnesota Board of Medical Practice Update newsletter notified physicians of the 1992 legislation which provided for a 25% increase in fees paid to physicians by Medical Assistance. The increase is to be funded, in part, by annually assessing a $400 surcharge for each licensed physician residing in Minnesota or contiguous states. The law requires the Board to issue the surcharge invoice and the Department to collect, impose interest and penalties, and to take court action where necessary to collect the surcharge. Once the surcharge has been billed, the Board cannot renew a license until any delinquent surcharge amount (including interest and penalties) has been paid. The law requires the $400 surcharge to be assessed as follows:

Group 1. A physician whose license is issued or renewed between April 1 and September 30 shall be billed on or before November 15 and the physician must pay the surcharge by December 15; and

Group 2. A physician whose license is issued or renewed between October 1 and March 31 shall be billed on or before May 15 and the physician must pay the surcharge by June 15.

The Board sent the first surcharge notice to Group 1 on November 1, 1992. Physicians with an October to March birth month will be billed as of May 1, 1993. Once the surcharge has been levied, a liability was incurred which cannot be erased. The law does not contain any provisions for waiver, exclusion, or exemption and neither the Board nor the Department has the authority to grant any waivers, exclusions or exemptions. If you have received a surcharge notice and do not pay, the Board will be unable to renew your medical license. Late fees and interest will be assessed for late payment of the surcharge by the Department of Human Services. Any questions concerning remittance should be directed to the Medical Care Surcharge Unit-DHS, 444 Lafayette Road, St. Paul, MN 55155-3850. Metro area call 296-6607. Greater Minnesota call 1-800-657-3762.

OPTIONS

If you are in Group 1 and have been issued a surcharge invoice, you must clear up the surcharge with the Department. Resigning your license or obtaining emeritus status will not alleviate your liability for the surcharge already incurred. You may prevent future surcharge liability by: 1) allowing your

license to lapse through nonrenewal; 2) resigning your license by signing the enclosed form; or 3) obtaining emeritus status if you are completely retired from the practice of medicine and do not see patients or prescribe.

If you are in Group 2 and you are practicing in North Dakota, South Dakota, Iowa or Wisconsin you may avoid the May 1993 surcharge liability by: 1) allowing your license to lapse through nonrenewal; 2) resigning your license by signing the enclosed form; or 3) obtaining emeritus status if you are completely retired from the practice of medicine and do not see patients or prescribe. If you resign your license or request emeritus status, you are not entitled to a refund of your annual fee. If you have requested resignation of your license in prior correspondence without signing a form acknowledging the implications of resigning, you must sign the enclosed form to request resignation. Your resignation request will be processed at the next bimonthly licensure committee meeting.

PENDING ISSUES

Several issues concerning the surcharge are pending as of January 18, 1993. It is anticipated that the Legislature will review the surcharge legislation in the 1993 session (January to May).

A class action lawsuit has been filed against the state claiming the improper application of the law retrospectively to physicians renewing between April and September, 1992.

Finally, there is some question as to how the federal rules governing surcharges will be applied to the Minnesota surcharge.

STATE OF MINNESOTA — DISTRICT COURT

COUNTY OF HENNEPIN — FOURTH JUDICIAL DISTRICT

Case Type: Class Action

Dr. Frank A. Ubel, M.D., and Dr. Howard Andersen, M.D., each individually and as members of a class of persons similarly situated,

Court File No.

Plaintiffs/Class Representatives,

vs.

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

State of Minnesota, Minnesota Board of Medical Practice, and the Minnesota Department of Human Services,

Defendants.

INTRODUCTION

The prior briefing on this motion has effectively narrowed the issues in dispute. There is no longer a dispute as to the retroactivity of Minn. Stat. Sec. 147.01 (6) (hereinafter "the Statute"). As the parties agree, the Statute was not intended to be applied retroactively. (Defendant's Reply Brief, p. 10).

The issue remaining before the court is whether the State has a right to assess the license renewal surcharge, effective October 1, 1992, on physicians who renewed their licenses

before that date. The parties agree that this issue should be analyzed under the Hanson, O'Keefe and Ehdlund cases.[1] The parties disagree on how that analysis should be conducted.

New issues were raised on May 27, 1993, when the Minnesota Legislature amended the Statute. The 1993 amendment should have no impact on the resolution of this matter. As a matter of law, it may not be used to interpret the 1992 Statute. Further, it is unconstitutional because it violates the principles of Equal Protection and Due Process.

ANALYSIS

A. Defendants have no authority to collect the license renewal surcharge from Plaintiffs.

The analysis performed in the Hanson, O'Keefe, and Ehdlund cases (hereinafter the "triggering event analysis") is simple. The Court ascertains the effective date of the statute authorizing collection of the funds and compares it with the date of the event triggering the State's right to recover funds. If the triggering event occurred before the authorizing statute became law, the State may not collect the funds. When the triggering event occurs after the effective date of the statute, the State is authorized to collect the funds.

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[1] These cases concern the State's ability to recover medical assistance funds from the estates of deceased recipients. They are relevant to the instant case because they set forth the principle that the State's right to collect funds from an individual are determined by whether the event establishing the State's right occurred before or after the effective date of the statute authorizing collection. The full citations of these cases are as follows: In Re Estate of Hanson, 451 N.W.2d 364 (Minn. Ct. App. 1990); In Re Estate of O'Keefe, 354 N.W.2d 531 (Minn. Ct. App. 1984); and In Re Estate of Ehdlund, 444 N.W.2d 861 (Minn. Ct. App. 1989). They are discussed more fully below and in Plaintiff's main brief on this motion.

In the instant case, the triggering event is the renewal of the physician's license. Defendant's attorneys agree "the event that triggers a surcharge liability is the issuance or renewal of [the physician's] license, even if [that] license is cancelled . . . after that date" Exhibit 4. Renewal of the physician's license is the last event in which they had the opportunity to avoid the surcharge. Defendant's often-repeated assertion that the license status on October 1, 1992 determines applicability of the surcharge is simply not contained in the statute.

Defendants ignore the triggering event analysis, asserting that the party's status on the effective date of the statute determines the State's collection rights. This "status analysis" is inconsistent with the Hanson line of cases, which use the triggering event analysis. The O'Keefe case makes it clear that "the determinative date for application of the retroactive standard is the death of the recipient of the aid." Hanson, 451 N.W.2d at 366-67. (Quoting Ehdlund, 444 N.W.2d at 863). The recipient's death is the triggering event. If the Hanson court had employed a status analysis, her status as a decedent on the effective date of the statute would have authorized, not prohibited, the State's recovery from her estate.

Defendants' status analysis does not withstand logical scrutiny. Applied to the Hanson line of cases, Defendants' status analysis would prohibit the State from ever recovering Medical Assistance funds. The State has no right to recover these benefits until an individual dies. Ms. Hanson was dead, but the State's recovery was prohibited. The status of the parties in O'Keefe and Ehdlund on the effective date of the statute was that they were both alive, therefore, under the status analysis, the State would be prohibited from recovering benefits paid. The status analysis similarly fails when applied to the instant case. If license status on October 1, 1992, determines applicability of the surcharge, then physicians who subsequently retire will continue to be assessed the surcharge, while physicians licensed in 1993 and beyond will not be

assessed in the future. The unreasonable results discussed in this paragraph were not intended by the legislature and must not be read into the Statute.

The triggering event analysis is more reasonable. When O'Keefe and Ehdlund passed away, after the authorizing statute became law, the State's right to collect funds was triggered. The fact that Hanson died before the effective date of the statute prohibited the State from collecting from her estate. In the instant case, the State's right to collect is triggered by renewal of a physician's license. Physicians who renewed before the effective date of the statute cannot be assessed until a triggering event (renewal of their license) occurs. When the triggering event occurs while the law is in place, the State has a right to collect the funds.

Under the triggering event analysis used in the Hanson line of cases, the State does not have the right to collect the surcharge from Plaintiffs. The triggering event (license renewal) occurred before the effective date of the statute (October 1, 1992). Therefore, Plaintiffs are entitled to a refund of amounts paid under color of the surcharge.

B. The surcharge is a new obligation on a prior transaction, therefore it is retroactive.

As discussed in Plaintiffs' main brief, Defendants' assessment of the surcharge constitutes an improper retroactive application of the Statute. Defendants have set up straw men in order to show that certain rights were not impaired. These arguments are extraneous because the focus must be on the obligation added to the prior transaction and the rights which actually were impaired.

There is no question that the $400.00 surcharge is a new obligation on a prior transaction. Physicians paid between $100 and $200 to renew their licenses prior to October 1, 1992. After October 1, 1992, Defendants informed Plaintiffs

that their prior license renewal obligated Plaintiffs to pay an additional $400.00. This new obligation, effectively increasing the price of renewal threefold, classifies assessment of the surcharge as an improper retroactive application of the statute. This issue and the impaired rights are discussed in Plaintiffs' main brief.

C. Defendants are not entitled to preferential treatment.

This case must be decided without special advantage to either party. Defendants are not entitled to deferential treatment of their statutory interpretation simply because the statute affects their budget. This logic, carried to its extreme, would allow any State agency to interpret taxing statutes as they see fit. While this would certainly impact the agency budgets, it would also create chaos. In addition, it violates the Minnesota Constitution by effectively moving the taxing power to the agencies. State agencies get their financing authority from the State legislature. They are not entitled to deference for their decision to act contrary to legislative intent. See In re Indep. Equal Access Corps.' Application for Certificate of Public Convenience and Necessity, 477 N.W.2d 516 (Minn. Ct. App. 1991); Olympia Brewing Co. v. Commissioner, 326 N.W.2d 642 (Minn. 1982). This case must be decided solely on its own merits.

D. The testimony of David Giel is inadmissible and should not be considered by the Court.

The testimony of David Giel, offered by affidavit, is inadmissible for two reasons. It is testimony by a legislative staff person, which has never been admitted to prove legislative intent and it is of no relevance because legislative intent is no longer an issue. "Subsequent testimony by

individual legislators regarding legislative intent is inadmissible in construing a statute." State Farm Mut. Auto Ins. Co., 392 N. W. 2d 558, 569 (Minn. Ct. App. 1986). A legislator can not be heard to testify later as to his own intent while debating a statute. A staff person's testimony is even further removed from the contemporaneous legislative history, and is without foundation to prove the state of mind of third party legislators. Defendants have agreed that the statute is not intended to be retroactive (Defendant's Reply Brief, p. 10). Mr. Giel's testimony could only possibly be relevant to that issue. It is inadmissible evidence and should not be considered by the court in making its decision.

E. The 1993 Amendment to the Statute can not be used to establish the 1992 legislature's intent and is unconstitutional.

The 1993 legislature, during its May 27th Special Session, as a part of the Omnibus Health and Human Services Bill, enacted Section 6 as an amendment to the Statute (herein called the "amendment") stating that the surcharge was to be levied upon all physicians *licensed* as of October 1st, 1992 who had obtained a license or renewal of a license after April 1st. In Section 129, the legislature of 1993 informs us that it is "clarifying" the intent of the 1991 legislature which enacted the Statute. In a transparent message to this Court, the legislature declares that its amendment "applies to pending cases," a surprising enactment since the Statute does not direct itself at rules governing judicial remedies.[2] It is clear that the

[2] At the same session, an amendment requiring notice of all surcharges upon application for license renewal became law. The State chose not to apply this reasonable requirement to pending cases. Plaintiffs received no notice of the surcharge at issue prior to renewing their licenses.

legislature is attempting to legislate the outcome of this case, and in that context another set of rather profound issues governing the separation of powers and due process is raised for discussion in this case .[3]

Two issues are raised. First, may a subsequent legislature establish the intent of a prior legislature by its declaration? Second, if the Amendment is found to authorize the surcharge imposed in 1992, is the surcharge unconstitutional as a denial of equal protection or as an unlawful taking of a vested right without due process?

a. The 1993 legislature can not construe the intent of the 1992 legislature,

In a similar situation, Justice Oliver Wendell Holmes stated "the later amendment . . . did not govern this case and cannot be invoked for construction of the earlier law." Levy v. Industrial Fin. Corp., 276 U.S. 281, 284, 48 S.Ct. 298, 299 (1928). A later legislature has no authority to construe the intent of an earlier legislature. See Bingham v. Supervisors of Winona County, 8 Minn. 395 (1878); Anderson v. Firle, 219 N.W. 284 (Minn. 1928). The Bingham court stated "it is only the intent of the legislature which enacts a statute which is to govern courts in the construction thereof. The opinion of a subsequent legislature upon the meaning of a statute is entitled to no more weight then that of the same men in a private capacity." Bingham, 8 Minn. at 398. The Anderson court recognized "the rule that one Legislature is not the interpreter of the laws enacted by a prior Legislature." Anderson, 219 N.W. at 285. Thus, it is clear that the amendments to the statute by the 1993 legislature can not be used in construing the intent of the 1992 legislature.

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[3] To assist the Court, Plaintiffs have attached copies of the 1993 enactment.

In certain instances, the legislature may pass a "curative" or "clarifying" amendment, if there are ambiguous terms in the prior statute. See Gudvangren v. Austin Mut. Ins. Co., 284 N.W. 2d 813, 817 (Minn. 1978); Holman v. All Nations Ins. Co., 288 N.W. 2d 244 (Minn. 1980). The language of such amendments is scrutinized very closely. In both the Gudvangen and Holman cases, the statute stated in its own terms that it was "an act . . . clarifying certain ambiguous provisions . . . " in the Minnesota No-Fault Automobile Insurance Act. Even with this clear language, Justices Otis and Peterson strongly dissented from the majority opinion in Gudvangen, based on the well-settled principle that a sitting legislature cannot express the intent of a prior legislature.

The 1993 amendment purports to be such a statute, but it really is not. In the instant case, there is no claim of ambiguous terms in the 1992 statute. Its effective date is October 1, 1992. The 1993 amendment claims only to clarify "the original intent" of the 1992 statute. Gudvagen allows clarification of ambiguous terms. Clarification of intent is another matter. The Levy and Bingham cases clearly dispossess the 1993 legislature of the authority to construe the intent of the 1992 legislature.

Defendants apparently recognize that the 1993 amendment is irrelevant to prove the intent of the 1992 legislature. Defendants are not arguing that the 1992 statute was intended to apply retroactively, rather that they applied it prospectively. (Defendants' Reply Brief, p. 10). The parties agree regarding the legislature's intent, but not about the application of the statute. This issue has been thoroughly discussed above.

b. The 1993 Amendment is Unconstitutional because it violates Equal Protection and Due Process

The question remaining is whether the State may collect the surcharge from Plaintiffs by authority of the 1993 Amendment, regardless of the 1992 statute. The 1993 amendment is unconstitutional, so the State may not collect the surcharge based on its authority.

The 1993 Amendment violates the principles of Equal Protection and Due Process protected by our State and Federal Constitutions. The Equal Protection Clause is violated because the 1993 amendment is class legislation which excuses some physicians from the surcharge based on an arbitrary distinction; their date of license renewal. U.S. Const. Amend. XIV, Sec. 1; Minn. Const. Amend. XIV, Sec. 1. The Due Process Clause is violated because the 1993 amendment retroactively impairs vested property rights of Plaintiffs. U.S. Const. Amend. XIV, Sec. 1; Minn. Const. Amend. XIV, Sec. 1.

The Amendment creates unconstitutional classes in violation of the equal protection clause. Class legislation is such as "selects particular individuals from a class and imposes on them special burdens from which others of the same class are exempt" and thus denies them equal protection of the laws. City of Duluth v. Northland Greyhound Lines, 52 N.W.2d 774, 779 (Minn. 1952). Challenges under the equal protection clause to statutes which do not burden fundamental rights are subject to a two step inquiry. First, the State must establish that the statute serves a legitimate purpose. Second, the State must establish that the classification is reasonably related to that purpose. See, e.g. Olson v. Blaeser, 458 N.W.2d 113 (Minn. Ct. App. 1990). This inquiry is known as "Rational Basis Test."

The 1993 amendment does not survive scrutiny under the rational basis test. The first prong is satisfied; raising money

for the general fund is a legitimate state purpose. The 1993 amendment falls on the second prong. The amendment creates two classes of physicians, dividing them in a manner not reasonably related to the purpose of the statute.

The 1993 amendment creates two classes of physicians regarding the annual license surcharge for 1992. The amendment applies the surcharge to all physicians "licensed as of or after [October 1, 1992] and whose license is issued or renewed on or after April 1, 1992 . . . " Minn. Stat. Sec. 147.01, subd. 6 (1993). Thus, the amendment assesses the surcharge on physicians renewing their license from April through December, 1992 but excludes those renewing their license from January through March 1992, The physicians are treated unequally, based solely on the arbitrary date of their license renewal.

There is no rational relationship between that class division and the fundraising purpose of the amendment. Therefore, the amendment does not survive scrutiny under the rational basis test and is a violation of the Equal Protection clauses of the Minnesota and United States Constitutions.

The 1993 Amendment violates the Due Process Clause because is an unlawful retroactive taking of vested rights. "Retroactive or curative legislation is prohibited by the 14th Amendment when it divests any private vested interest". Olsen v. Special School Dist. No. 1, 427 N.W.2d 707 (Minn. Ct. App. 1988); "[V]ested rights include . . . an exemption from new obligations created after the right vested." Yaeger v. Delano Granite Works, 84 N.W.2d 363, 367 (Minn. 1957). "A vested right . . . means some right or interest in property that has been fixed or established." Olsen at 427 N.W.2d 711. "A person's occupation or calling is property within the meaning of the law and entitled to protection as such."

Fairview Hospital Association v. Public Building Employee's Local 113, 64 N.W.2d 16 (Minn. 1954).[4]

This analysis is not altered by the possible curative or retrospective nature of the 1993 amendment. "A curative act can not impair vested rights". Snortum v. Snortum, 193 N.W. 304 (Minn. 1923). "Retrospective legislation in general will not be allowed to impair rights which are vested and which constitute property rights." Wichelman v. Messner, 83 N.W.2d 800 (Minn. 1957). The 14th Amendment "prohibits retroactive legislation when it divests any private vested interest." USCA Const.Amd14; K.E. v. Hoffman, 452 N.W.2d 509 (Minn. App. 1990).

The 1993 Amendment divest Plaintiffs of two vested property rights. Obviously, the Plaintiffs' interest in their $400.00 is a vested property right. By taking the $400.00, the amendment divests them of this right. Further, the surcharge is an impairment of Plaintiffs' vested right to practice medicine because it is a new obligation created after the right vested.

The 1993 Amendment requires a $400.00 payment from Plaintiffs, thus divesting them of their interest in that property. Curative or retrospective legislation is prohibited when it divests any private vested interest. The Amendment extracts payment based on Plaintiffs' license renewal that occurred months before the amendment was passed. It is a retroactive divestment of a vested property right; and, therefore unconstitutional.

"A protected property interest is created when the governing state law gives an individual an entitlement that is only removable for cause." Schocker v. State Dept. of Human Rights, 477 N.W.2d 767 (Minn. Ct. App. 1991). For Plaintiffs, their protected property interest vested when their

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[4] Practice of a profession is "a right for all who are educationally and morally qualified." In re: Haukebo, 352 N.W.2d 752 (Minn. 1984) (practice of law).

licenses were renewed by Defendants, under statutory authority, between April and September, 1992, establishing their right to practice medicine. The right of Plaintiffs to pursue their livelihood is a constitutionally protected property right. See, Fairview Hospital Association.

The 1993 Amendment is unconstitutional because it assesses a new obligation (a $400.00 surcharge) on Plaintiff's vested property right. In 1992, the time of vesting, there was no obligation to pay the surcharge imposed by the 1993 amendment. Months after the rights vested, the 1993 amendment attached the new surcharge obligation to the 1992 renewals. This is an unconstitutional, retroactive impairment of Plaintiffs, vested property right.

The 1993 Amendment is unconstitutional because it violates the equal protection clause by creating arbitrary classes and because it violates the due process clause by retroactively impairing vested property rights. Accordingly, the State is prohibited from reaching back to surcharge physicians licensed between April and September, 1992. The 1993 Amendment is unconstitutional.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that this court grant their Motion for Summary Judgment and deny the Summary Judgment Motion brought by Defendants.

LOMMEN, NELSON, COLE &
STAGEBERG, P.A.

Dated: June 8, 1993 By s/s

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EXCERPTS FROM 1993 AMENDMENT

project designs shall be the threshold amount of the original proposal as identified according to section 144A.071, subdivision 2, except under conditions described in clause (4); and

(4) total costs up to ten percent greater than the cost identified in clause (3) may be recognized for reimbursement if the proposer can document that one of the following circumstances is true:

(i) changes are needed due to a natural disaster;

(ii) conditions that affect the safely or durability of the project that could not have reasonably been known prior to approval are discovered;

(iii) state or federal law require changes in project design; or

(iv) documentable circumstances occur that are beyond the control of the owner and require changes in the design.

(c) Approval of a request for an amendment does not alter the expiration of approval of the project according to subdivision 3.

Sec. 6. Minnesota Statutes 1992, section 147.01, subdivision 6, is amended to read:

Subd. 6. [LICENSE SURCHARGE.] In addition to any fee established under section 214.06, the board shall assess an annual license surcharge of $400 against each physician licensed under this chapter. The surcharge applies to a physician who is licensed as of or after the effective date of this section in Laws 1992, and whose license is issued or renewed on or after April 1, 1992, and is assessed as follows:

(1) a physician whose license is issued or renewed between April 1 and September 30 shall be billed on or before November 15, and the physician must pay the surcharge by December 15; and

(2) a physician whose license is issued or renewed between October 1 and March 31 shall be billed on or before May 15, and the physician must pay the surcharge by June 15.

The board shall provide that the surcharge payment must be remitted to the commissioner of human services to be deposited in the general fund under section 256.9656. The board shall not renew the license of a physician who has not Paid the surcharge required under this section. The board shall promptly provide to the commissioner of human services upon request information available to the board and specifically required by the commissioner to operate the provider surcharge program. The board shall limit the surcharge to physicians residing in Minnesota and the states contiguous to Minnesota upon notification from the commissioner of human services that the federal government has approved a waiver to allow the surcharge to be applied in that manner.

Sec. 7. Minnesota Statutes 1992, Section 147.02, subdivision 1, is amended to read:

Subdivision 1. [UNITED STATES OR CANADIAN MEDICAL SCHOOL GRADUATES.] The board shall, with the consent of six of its members, issue a license to practice medicine to a person who meets the following requirements:

(a) An applicant for a license shall file a written application on forms provided by the board, showing to the board's satisfaction that the applicant is of good moral character and satisfies the requirements of this section.

(b) The applicant shall present evidence satisfactory to the board of being a graduate of a medical or osteopathic school located in the United States, its territories or Canada, and approved by the board based upon its faculty, curriculum, facilities, accreditation by a recognized national accrediting organization approved by the board, and other relevant data, or is currently enrolled in the final year of study at the school.

(c) The applicant must have passed a comprehensive examination for initial licensure prepared and graded by the national board of medical examiners or the federation of state medical boards. The board shall by rule determine what constitutes a passing score in the examination.

(d) The applicant shall present evidence satisfactory to the board of the completion of one year of graduate, clinical medical training in a program accredited by a national accrediting organization approved by the board or other graduate training approved In advance by the board as meeting standards similar to those of a national accrediting organization.

(e) The applicant shall make arrangements with the executive director to appear in person before the board or its designated representative to show that the applicant satisfies the requirements of this section. The board may establish as internal operating procedures the procedure or requirements for the applicant's personal presentation.

(f) The applicant shall pay a fee established by the board by rule. The fee may not be refunded. Upon application or notice of license renewal, the board must provide notice to the applicant and to the person whose license is scheduled to be issued or renewed of any additional fees, surcharges, or other costs which the person is obligated to pay as a condition of licensure. The notice must:

(1) state the dollar amount of the additional costs;

(2) clearly identify to the applicant the payment schedule of additional costs; and

(3) advise the applicant of the right to apply to be excused from the surcharge if a waiver is granted under section 256.9657, subdivision 1b, or relinquish the license to practice medicine in lieu of future payment if applicable.

(g) The applicant must not have engaged in conduct warranting disciplinary action against a licensee. If the applicant does not satisfy the requirements of this paragraph,

the board may refuse to issue a license unless it determines that the public will be protected through issuance of a license with conditions and limitations the board considers appropriate.

Sec. 8. Minnesota Statutes 1992, section 246.18, subdivision 4, is amended to read:

Subd. 4. [COLLECTIONS DEPOSITED IN THE GENERAL FUND.] Except as provided in subdivisions 2 and 5, all receipts from collection efforts for the regional treatment centers, state nursing homes, and other state facilities as defined in section 246.50, subdivision 3, must be

must be designed to take effect July 1, 1994, and to raise an amount of revenue equal to the amount anticipated from the current surcharge.

Sec. 128. [STUDY OF BED REDISTRIBUTION.]

The interagency long-term care planning committee shall present to the legislature, by January 15, 1994, recommendations for redistributing existing nursing home beds and certified boarding care home beds to meet demographic need. This recommendations must include, but are not limited to, comment on the concepts of bed layaway and bed transfer. The interagency long-term care planning committee shall convene a task force comprised of providers, consumers, and state agency staff to develop these recommendations.

Sec. 129. [LEGISLATIVE INTENT.]

Sections 6 and 15, paragraph (b); and the amendment to paragraph (a), clause (3), in section 123, are intended to clarify, rather than to change, the original intent of the statutes amended.

Sec. 130. [WAIVER REQUEST TO LIMIT ASSET TRANSFERS.]

The commissioner of human services shall seek federal law changes and federal waivers necessary to implement the amendments to Minnesota Statutes, section 256B.0595.

Sec. 131. [NURSING HOME SURCHARGE DISCLOSURE.]

A nursing home licensed under Minnesota Statutes, chapter 144A, and not certified to participate in the medical assistance program shall include the following in 10-point type in any rate notice issued after the effective date of this section: THE NURSING HOME SURCHARGE THAT APPLIES TO THIS FACILITY EFFECTIVE OCTOBER 1, 1992, THROUGH JUNE 30, 1993, IS $535 PER BED PER YEAR, OR $1.47 PER DAY. THE SURCHARGE IS INCREASED

EFFECTIVE JULY 1, 1993, TO $620 PER BED PER YEAR, OR A TOTAL OF $1.70 PER DAY AND EFFECTIVE JULY 1, 1994, TO $675 PER BED PER YEAR, OR A TOTAL OF $1.72 PER DAY. ANY RATE IN EXCESS OF THESE AMOUNTS IS NOT DUE TO THE NURSING HOME SURCHARGE.

Sec. 132. [REPORT TO THE LEGISLATURE.]

The commissioner of human services, in coordination with

must submit to the Commissioner quarterly expenditure reports and reconcile the actual expenditure on September 1, 1995.

Subd. 5. [REPORT.] The commissioner must evaluate the pilot projects and report findings to the legislature by February 1, 1995. The report must evaluate client outcomes and service utilization, total spending and average per client costs, administrative cost reductions, changes in the types of services provided, and any border problem with contiguous nonpilot counties.

Sec. 134. [REPEALER.]

Minnesota Statutes 1992, section 252.478 is repealed.

Sec. 135. [EFFECTIVE DATES.]

Subdivision 1. Sections 7, 28, and 45 are effective the day following final enactment. Sections 12 and 131 are effective the day following final enactment.

Subd. 2. Section 127 is effective the day following final enactment.

Subd. 3. Section 126 is effective the day following final enactment.

Subd. 4. Section 35 is effective for transfers made for less than fair market value on or after July 1, 1993, or after the effective date of any applicable federal waivers, whichever is later, except that those portions of section 35 that may be implemented without federal waivers are effective for transfers made for less than fair market value on or after July 1, 1993.

Subd. 5. Section 32 is effective retroactive to October 1, 1992.

Subd. 6. Section 61, paragraph (c), is effective upon the receipt by the commissioner of human services of the requested waiver from the secretary of human services, for persons screened for admission to a nursing facility on or after the date the waiver is received.

Subd. 7. Sections 6 and 129 are effective the day following final enactment and apply to cases pending or brought on or after their effective date.

Subd. 8. Section 42 is effective retroactive to July 1,

Article 5 section 135

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Case Type: Class Action

Dr. Frank A. Ubel, M.D., and Dr. Howard Andersen, M.D., each individually and as members of a class of persons similarly situated,

Court File No. MC-90-001114

Plaintiffs/Class Representatives,

vs.

PLAINTIFFS' SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

State of Minnesota, Minnesota Board of Medical Practice, and the Minnesota Department of Human Services,

Defendants.

This Supplement to Plaintiff's Reply Memorandum will address more fully the question of whether the 1993 Amendment is a valid enactment. This issue was already addressed in terms of the due process and equal protection objections engendered by the Amendment. These arguments will not be reiterated. The Amendment is also invalid because it invades, contrary to Article III of the Minnesota

Constitution,[1] the judicial power residing in the courts of this State.

Summary

The Amendment, as the 1993 Legislature concedes in Sec. 129 of the Bill, was enacted for the purpose of declaring the "original intent" of the 1991 Legislature. It is not within the legislative power to legislate the construction of laws made by prior legislatures; the construction of statutes incidental to adjudicating controversies is within the judicial power. As an exercise of judicial rather than legislative power, the Amendment is void. To underscore their purpose, the Legislature went on to declare the Amendment "applicable to pending cases," a provision used only where an enactment is intended to affect judicial remedies generally, e.g. amendments to a statute of limitations. The 1993 Amendment is not, of course, such a law unless seen solely in the context of an instruction to this Court on how this case must be decided. The 1993 Legislature is declaring that the Amendment is to be seen solely in this context. Thus it is plain that the 1993 Legislature is intent upon legislating the outcome of this particular judicial controversy.

Seen in their broader constitutional dimension, the resolution of the issues in this case will have momentous impact upon Minnesota's concept of a separate judicial power. If the Plaintiff class loses these issues, the judicial power shall be contingent upon legislative acceptance. Lobbyists and political action committees shall become a necessary adjunct

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[1] Art. III, sec. 1 reads: *The powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging in either of the others except in the instances expressly provided in this Constitution.*

to litigation. The Court's decision shall be nothing more than a postscript.

BACKGROUND

The facts of this case are discussed in detail in the prior briefs on this motion. It is sufficient here to remind the Court that Minn. Stat. Sec. 147.01, subd. 6 (the "statute") was amended on May 27, 1993. The changes included, among others, new language in Sections 6, 129 and 134 (collectively: "the 1993 amendment"), of the Omnibus Health and Human Services Act (the "Act"). Section 6 seeks to apply the 1992 surcharge to members of Plaintiff Class. Section 129 states that Section 6 is intended to "clarify the original intent of the statute amended". Section 134, Subd. 7 of the Act seeks to legislate the outcome of the lawsuit before this Court by applying the 1993 amendment to "pending cases", even though the surcharge is unrelated to the civil justice system. "Pending cases" is a euphemism for the instant case, which is the only lawsuit pending regarding the 1992 surcharge.

ANALYSIS

The 1993 amendment is unconstitutional and of no effect, because it was enacted for a purpose beyond the power of the legislature. Article III prohibits the respective branches of government from exercising "any of the powers properly belonging to either of the others except in the instances specifically provided in this constitution." Minn.Stat. Const.Art.III, Sec.1. When the legislature "exercises powers not properly belonging to the legislative, but to the judicial department of the government, then the act is in contravention of the constitution and void." Sanborn v Commissioners of Rice County, 9 Minn. 273, 263 (1864). See Metropolitan

Sports Facilities Commission v General Mills, 470 N.W.2d 118, 124-5 (Minn. 1991).

Statutory construction is a judicial, not a legislative function. "The determination of the construction of the meaning of Congressional Acts is a judicial function. It is so entirely and purely judicial that it is beyond the power either of the executive or of the Congress to control." Walker v. U.S., 83 F. 2d 103, 106 (C.A.8 1936) "Judicial power is the power that ... declares, construes and applies the law." In re Hunstiger, 153 N.W. 869, 870 (Minn. 1915) A subsequent legislature's interpretation of a statute is disregarded by courts construing the statute. See Levy v. Industrial Fin. Corp., 276 U.S. 281, 284, 48 S.Ct. 298, 299 (1928); Bingham v. Supervisors of Winona County, 8 Minn. 395 (1878); Anderson v. Firle, 219 N.W. 284 (Minn. 1928). The 1993 legislature's opinion of the 1992 legislature's intent "is entitled to no more weight than that of the same men in a private capacity." Bingham at 8 Minn. 398.

The fundamental power to construe the statute at issue here belongs only to this Court. In contravention of the Constitution, the 1993 legislature enacted into law its own interpretation of the statute. The purpose of the 1993 amendment was to construe the statute and "clarify the original intent of the statute amended" (sec. 129), as the 1993 Legislature understood the 1992 Legislature's intent. This statutory construction is beyond the Legislature's power and is an exercise of power properly belonging to the Judicial Branch.

The Amendment, also, may not stand as an independent enactment of the surcharge liability of the Plaintiff class. If the 1993 Legislature had enacted a free standing amendment imposing surcharge liability on physicians whose licenses were "issued or renewed on or after April 1, 1992," the Amendment would have to be tested under due process and equal protection principles. In this instance, however, the

Legislature intended nothing more by the Amendment than to "clarify" the intent of the 1991 Legislature. It did not intend in 1993 to impose anew, surcharge liability on the Plaintiff class. The Court must still look to the 1992 enactment to answer the primary issue in this suit: Was the Plaintiff class properly surcharged $400 on a retroactive basis under the 1992 enactment? It is not unreasonable to allow the Legislature's declared intent to govern the construction of the Amendment. Indeed *Minn. St. 645.16* appears to require it. It is clear accordingly that the Amendment may not be construed as an independent statutory basis to impose the surcharge on the Plaintiff class.

CONCLUSION

For the foregoing reasons, and the reasons stated in Plaintiffs' prior briefs, Plaintiff Class respectfully request that this Court grant its Motion for Summary Judgment and deny Defendants' motion.

LOMMEN, NELSON, COLE & STAGEBERG, P.A.

Dated: June 11, 1993 By s/s

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STATE OF MINNESOTA — DISTRICT COURT

COUNTY OF HENNEPIN — FOURTH JUDICIAL DISTRICT

Case Type: Class Action

Dr. Frank A. Ubel, M.D., and Dr. Howard Andersen, M.D., each individually and as members of a class of persons similarly situated,

Plaintiffs/Class Representatives,

vs.

State of Minnesota, Minnesota Board of Medical Practice, and the Minnesota Department of Human Services,

Defendants.

Court File No. MC 93 001114

PLAINTIFFS' MEMORANDUM OF LAW IN RESPONSE TO DEFENDANTS' JULY 20, 1993 MEMORANDUM

INTRODUCTION

Rarely is the briefing on a motion as exhaustive as that in this case. The limited purpose of this final brief is to focus on the special concerns introduced into this controversy by the 1993 amendment to Minn. Stat. 147.01, subd. 6. The issue, broadly stated, is whether the imposition in May, 1993 of a retroactive surcharge on the professional licenses of the Plaintiff Class alone is constitutional.

The Defendants argue that the Plaintiffs were obliged to amend their complaint to argue about the 1993 amendment. This argument is nonsense. The Plaintiffs' claim has always been to win a refund of the unlawfully imposed surcharge of $400 each. The 1993 enactment only broadened the points to argue; it did not change the cause of action.

ARGUMENT

1. THE 1993 AMENDMENT RETROACTIVELY ENLARGED THE PHYSICIANS LIABLE FOR THE SURCHARGE TO INCLUDE THE PLAINTIFF CLASS.

Although an amendment presumptively changes the amended statute, this presumption is not available when the language of an amendment states that it is intended to "clarify" the original statute. State v. Coin Wholesalers, Inc., 250 N.W.2d 583 (1976). The 1993 Amendment purports to be a clarifying statute. Therefore, Defendants correctly argue that the Plaintiff Class may not avail itself of a *presumption* that the 1993 amendment was intended to change the 1992 statute. The Defendants, err, however, in their deduction that a legislature's pronouncement of an intention to "clarify" establishes the converse, i.e. no change.

Rebuttal of the presumption of change does not create a presumption of "no change". It merely eliminates the presumption. The statute and subsequent amendments are compared without a presumption. Suske v. Straka, 39 N.W.2d 745 (Minn. 1949).

A simple reading of the statute in issue here and its subsequent amendment reveals a change was made. The 1992 statute does not impose the surcharge on licenses issued or renewed before October 1, 1992. The amendment does impose this charge. The 1993 statute is specific to this class

(See Laws 1993 Special Session Ch. 1, Article 5, Section 6) (attached as Exhibit A). It is neither an especially cynical nor sophisticated observation that the 1993 legislature, aware that the Attorney General's arguments to charge the Plaintiffs under the 1992 statute were insubstantial, was attempting to win this lawsuit for the Defendants. The question is whether the legislative power extends that far. It is especially revealing in this connection to note that the legislature in 1993 passed a companion statute to the surcharge requiring notice in advance of the imposition of surcharges on professional licenses but did not grant the Plaintiff Class the benefit of such notice requirement (See Laws 1993 Special Session, Ch. 1, Article 5, Section 8). The legislature's action here reveals its awareness that the 1992 surcharge enactment in April, 1992 with an effective date of October 1st did not give notice to the Plaintiff Class of the imposition of the surcharge. In other words, the legislature acknowledges that no reasonable person reading the 1992 enactment in April, 1992 would have been on notice that the $400 surcharge was being imposed on licenses issued or renewed between April 1st and September 30th.

If the 1993 legislature believed that the 1992 statute could fairly be read to have provided that notice, it had no need to single out the Plaintiff Class and deny them the benefit of advance notice otherwise conferred on every other person in Minnesota who either renews or is issued a medical license after enactment of the 1993 Amendment.

The issue for decision, therefore, is whether the 1993 legislature may, consistent with constitutional constraints of due process and equal protection, single out the Plaintiff Class for the retroactive imposition of a professional license surcharge where no advance notice was provided that the surcharge was impending. The 1992 statute is no longer an issue because it plainly did not authorize the imposition of the $400 surcharge on the Plaintiff Class.

2. THE 1992 STATUTE DID NOT SURCHARGE THE LICENSES OF THE PLAINTIFF CLASS.

Defendants assert that the following three conclusions can be drawn from the 1992 statute:

> One, the legislature intended the law be applied to physicians holding active licenses on the effective date of the law (October 1, 1992). Two, the legislature intended the physicians to be divided into two groups for purposes of billing and collecting the surcharge. Three, the legislature intended that physicians who had obtained or renewed their licenses between April 1, 1992 and September 30, 1992 be billed first. (Defendants July, 18, 1993 Brief at 5)

Only the second of these conclusions is actually supported by language in the statute.

There is no language in the statute applying the law "to physicians holding active licenses on the effective date of the law (October 1, 1992)". Regardless of how many times Defendants repeat their assertion, holding a physician's license on October 1, 1992 did not trigger liability for the surcharge. If the Defendants were correct here, the liability for the surcharge would extend back beyond April 1st and would apply to every physician on the license roll as of October 1st, regardless of when the license was issued or renewed. The date of issue or renewal dictates the billing cycle only, not liability for the surcharge. The Defendants admit, however, that liability stops with licenses issued or renewed before April 1, 1992. (Ex. B, Defendants' Response to Plaintiff's Request for Admissions). Additionally, in years to come, many physicians whose licenses are issued for the first time in 1993 and beyond will be surcharged under this statute. By Plaintiffs'

reading these physicians should be exempt from the surcharge because their licenses were not active on October 1, 1992.

The 1992 statute contains no language applying the statute to physicians whose licenses are renewed between April 1, 1992 and September 30, 1992. These physicians are not described in the 1992 statute. The theory that physicians renewing between April 1 and September 30, 1992 should be billed first because they are described in subdivision 1 of the statute is without ground in the law or logic and ignores the plain fact that this class of physicians is not mentioned at all in the law.

3. THE 1993 AMENDMENT IS UNCONSTITUTIONAL.

The 1993 amendment is unconstitutional because it violates the principles of Equal Protection and Due Process guaranteed by the constitutions of the United States and the State of Minnesota.

A. THE 1993 AMENDMENT VIOLATES PRINCIPLES OF DUE PROCESS AND UNCONSTITUTIONALLY IMPAIRS PLAINTIFF'S PROTECTED PROPERTY RIGHTS.

The 1993 Amendment violates Due Process guarantees contained in the United States and Minnesota Constitutions. The amendment retroactively impairs Plaintiffs vested right to practice medicine and their vested property rights. This impairment is prohibited by the Federal and State Constitutions.

1. Plaintiffs right to practice medicine and their interest in their own property are vested rights protected by the Constitution.

a. Plaintiffs' right to practice medicine is a protected property interest.

Practice of a profession is a property right protected by the 14th amendment. Barry v. Barchi, 443 U.S. 55 (1979); In Re: Haukebo, 352 N.W.2d 752 (Minn. 1984); Any entitlement granted by the state, such that it is removable only for cause, creates a vested property right. Perry v. Sinderman, 408 U.S. 593 (1972); Schocker v. State Department of Human Rights, 477 N.W.2d 767 (Minn. Ct. App. 1991). When the State renewed Plaintiffs' medical licenses, Plaintiffs acquired a protected property interest for the term of that license.

The Paron case cited by Defendants buttresses Plaintiffs' position, stating that "a license confers upon the licensee the right to engage in the licensed business only for the term specified in the license." Paron v. City of Shakopee, 32 N.W.2d 603, 608 (Minn. 1948). The conclusion drawn, apparently, from this holding is pure sophistry, however. See the discussion, infra., on page 7.

The other cases cited by Defendants are inapposite. They establish the principle that there is no vested property interest in an abandoned professional license. In State v. Hovarka, 110 N.W. 870 (Minn. 1907), for example, a pharmacist who abandoned his license for eight years was convicted of practicing without a license. The Court held that his initial license, once abandoned, no longer provided a vested right to practice pharmacy. This holding does not apply to the instant case. All physicians in Plaintiff Class had fulfilled renewal requirements and possessed the vested right to practice medicine prior to the effective date of the 1993 amendment.

b. Plaintiffs' interest in their $400.00 is a constitutionally protected property right.

It is elementary that Plaintiffs have a vested interest in their own property. "A vested right . . . means some right which has been fixed or established." Olsen v Special School District No. 1, 427 N.W.2d 707, 711 (Minn. Ct. App. 1988). Prior to the assessment of the surcharge, each Plaintiff had established a right to $400.00 in their possession. This property interest is constitutionally protected. K.E. v. Hoffman, 452 N.W.2d 509 (Minn. App. 1990).

2. The 1993 Amendment retroactively impairs the protected property rights of Plaintiffs.

A new obligation attached to an old transaction constitutes a retroactive impairment. Cooper v. Watson, 187 N.W.2d at 693. Plaintiffs current right to practice medicine is impaired because the 1993 amendment imposes the new obligation to pay a $400.00 surcharge on the concluded, valid 1992 license renewal. Plaintiffs paid a license renewal fee in 1992 of approximately $170.00. In 1993, after some of the licenses had already expired, the 1993 amendment added a new surcharge, increasing the cost of the 1992 renewal by $400.00. This new obligation is a retroactive impairment of Plaintiffs' vested property right to practice their profession. It also divests all Plaintiffs' protected rights in the $400.00 taken by Defendants.

The 1993 amendment mandates that the previously issued or renewed license may never be renewed unless the physician pays the retroactively imposed surcharge. The Attorney General argues that the previously issued or renewed license is not impaired thereby because it may continue to the end of its term. Since the penalty imposed goes only to future renewals, no vested right is impaired. This argument ignores Cooper.

However the State crafts the penalty, it has nonetheless imposed a new obligation on an old transaction.

3. The 1993 Amendment is unconstitutional because it retroactively impairs constitutionally protected property rights.

The 14th Amendment "prohibits retroactive legislation when it divests any private vested interest". K.E. v. Hoffman, 452 N.W.2d 509 (Minn. App. 1990); Holen v. Metropolitan Airports Commission, 84 N.W.2d 282, 287 (Minn. 1957). "Retrospective legislation in general will not be allowed to impair rights which are vested and which constitute property rights." Wichelman v. Messner, 83 N. W. 2d 800 (Minn. 1957). New taxes, retroactively applied, violate due process. See Untermeyer v. Anderson, 276 U.S. 440 (1928); Rosenberg v. U.S., 86-2 Tax Cts. (CCH) p. 13, 703 (Cert. Dist. Cal. 1986).

The 1993 Amendment is a retrospective statute impairing Plaintiffs' vested rights. It imposes a new surcharge on Plaintiffs. As such, it violates the Due Process principles of the United States Constitution and the Minnesota Constitution. It is void as such and must have no effect on the outcome of this case.

B. THE 1993 AMENDMENT VIOLATES EQUAL PROTECTION PRINCIPLES BECAUSE IT DIVIDES PHYSICIANS INTO TWO ARBITRARY CLASSES, WHICH ARE NOT RATIONALLY RELATED TO A LEGITIMATE STATE INTEREST.

The 1993 amendment violates equal protection principles which guarantee that similar people will be dealt with in a similar manner. Class legislation is prohibited if it creates

arbitrary classes which are not rationally related to a legitimate state interest. The 1993 amendment is unconstitutional because it creates such classes, in violation of the Equal Protection clauses of the United States.

Laws may be applied in a manner that creates classes if all persons similarly situated are treated equally, "The Equal Protection Clause of the 14th Amendment commands that 'no state shall deny to any person within its jurisdiction the equal protection of the laws' which is essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985). In order to satisfy equal protection requirements, all classes created by a statute must be reasonably related to a legitimate state interest. (Id.) "The state may not rely on a classification whose relationship to an asserted goal is so tenuous as to render the distinction arbitrary or irrational." Id. at 473 U.S. 446.

In this case, of course, Minnesota was raising money for the its "general fund." Minn. Stat. 147.01, subd. 6. While raising money for the state's general fund is itself a legitimate purpose, no competent explanation of why meeting this need may constitutionally be imposed selectively and retroactively on physicians born between April 1st and September 30th and physicians entering practice initially between April 1, 1992 and September 30, 1992, has been offered. No rational basis for selection of this class comes to mind or is itself suggested in the statute.

The Attorney General has described three purposes for the 1993 legislation. First, he advises that "the Legislature has determined to utilize provider surcharges to enhance the financial integrity of the state." Defendant's Supplemental Response, July, 1993, p. 17. If so, charge all providers equally.

Second, in his earlier memorandum (March 18, 1993 at p. 3), we are told that the surcharge fund was revised to meet a

federal requirement enacted in 1991 "that states use a broad-based and uniform method of surcharging providers and prohibit[ing] a direct payback of the surcharge to providers." If this is true, selecting this class of physicians is hardly a "broad based and uniform" method of surcharging health care providers.

Third the Attorney General confesses in his June 15th memorandum at page 9 that the 1993 statute was a reaction to this lawsuit. Apparently the 1993 Legislature selected this class because it complained.

None of these claimed purposes rationally relates to selecting approximately one-half of the state's physicians on the basis of birth date and initial license date to raise about $2 million for the State's general fund.

The United States Supreme Court has consistently invalidated statutes which create class distinctions unrelated to legitimate state interests. Statutes are unconstitutional, for example, if they retroactively provide different levels of benefits based on the date citizens establish residence in a state Zobel v. Williams, 457 U.S. 55 (1981) (a statute denies equal protection when it provides disparate benefits based on length of residency); Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985) (a statute granting tax benefits to Vietnam war veterans based on date of the inception of state residency denies equal protection). In those cases, The Supreme Court made it clear that statutes retroactively creating fixed permanent distinctions are not constitutional. Other examples of statutes held unconstitutional under the Rational Basis test are those creating classes based on mental retardation (Cleburne, supra), foreign residency of business owners (Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985)) and extended families (Village of Belle Terre v. Boraas, 416 U.S. 1 (1974)).

The Hooper and Zobel cases are most instructive here. These cases establish that "when a state distributes benefits

unequally, the distinctions it makes are subject to scrutiny under the Equal Protection clause of the 14th Amendment. (Hooper at 472 U.S. 612, 618 (1985)). "Zobel made it clear that the constitution will not tolerate a state benefit program that creates fixed permanent distinctions between classes and concededly bona fide residents based upon how long they have been in the state." Hooper at 472 U.S. 6, 22 (citing Zobel at 457 U.S. 59).

The Hooper case also held that "singling out previous residents for tax exemption, rewards only those citizens for their past contributions toward our nation's military effort in Vietnam. Zobel teaches us that such an objective is not a legitimate state purpose'." Hooper at 472 U.S. 612 (citing Zobel at 457 U.S. 63). "The only apparent justification for the retrospective aspect of the program, 'favoring established residents over new residents,' is constitutionally unacceptable." Zobel at 457 U.S. 64.

Although these cases deal specifically with conferring a selective benefit on the basis of retroactive criteria rather than imposing a charge on such a basis as in the instant case, the distinction is not material for the purpose of analysis. Both examples are tested on the rational basis analysis. If length of state residency is not rationally related to tax benefits conferred on a retroactively defined class, what can be said about profession and birth date as a retroactive criteria for a selective tax to "enhance the financial integrity of the state?"

The constitutionally invalid distinctions discussed are less arbitrary than the two classes created by the 1993 amendment. Here a retroactively selected sub-group of physicians has been assessed a $400 surcharge. The benefit of the funds raised from this small group, however, is distributed among all Minnesotans because its purpose was to "enhance" the state's "fiscal integrity." The only argument offered for this selection is that in 1992 a prospective surcharge, broadly based, was imposed on health care providers generally. Oddly this

argument neglects to account for the fact that the Plaintiff Class like everyone else is subject to this surcharge when they renew their licenses. The class could not have been selected because of some exemption conferred upon it in the previous law.

2. The 1993 amendment's class distinctions are unconstitutional because they are not rationally related to the purpose of the statute.

In order to withstand scrutiny under Equal Protection analysis, Defendants must show that distinctions between the classes created by the 1993 amendment are rationally related to a legitimate state purpose. See e.g., Cleburne at 473 U.S. 446; Olson v. Blaeser, 458 N.W.2d 113 (Minn. Ct. App. 1990). To determine whether people are similarly situated, one must look to the purpose of the legislation. See Hooper, 422 U.S. 612 (1985); Zobel, 457 U.S. 55 (1981); Matter of McCannel, 301 N.W.2d 910 Minn. 1980. If people similarly situated are treated differently, and that classification is not reasonably related to the statute's purpose, the statute violates equal protection principles and is unconstitutional. As Justice Stevens stated in his concurrence in Cleburne:

> "I have always asked myself whether I could find a rational basis for the classification at issue. The term rational, of course, includes the requirement that an impartial lawmaker could logically believe that the classifications at issue would serve a legitimate public interest." Id. at 472 U.S. 451.

As discussed earlier, the transparent purpose of the 1993 Amendment is to help Defendants win this lawsuit. Adjudicating the winner of the case is a judicial, not a legislative, function. Defendants allude to two other purposes for the 1993 Amendment. The first is to raise money for the

state's general fund and the second, stated only indirectly, is to acquire additional matching funds from the Federal Government. The classes created by the 1993 Amendment are not rationally related to either purpose. There is no characteristic of Minnesota physicians which makes it reasonable for them to carry the entire burden of replenishing the State's depleted coffers. Nor is there a rational basis to isolate physicians, out of all health care providers, to bear the burden required to obtain federal Medical Assistance benefits shared by the Minnesota health care industry.

a. The inequitable treatment of Plaintiffs promulgated by the 1993 amendment is not rationally related to a legitimate state interest.

Under the rational basis test, it is incumbent on the State to establish that the classification is reasonably related to a legitimate State purpose. Defendants have provided no such basis for the classifications created by the 1993 Amendment. The classifications are not rationally related to a legitimate state interest and are unconstitutional as a violation of Equal Protection principles.

i. The classes are not rationally related to collection of the surcharge or raising money for the state.

When the 1993 Amendment was passed, physicians renewing or receiving a license since October 1, 1992, were already being surcharged. The 1993 Amendment selected a group, physicians, and required them alone to pay a surcharge on licenses already issued or renewed. Then, within this class, it imposed the burden only on those whose licenses were issued or renewed between April 1 and September 20, 1992. The Defendants argue that their purpose was to raise a larger

sum of money than would be raised by surcharging from October 1, 1992. The Defendants do not explain why the retroactively determined need to raise more money justified selecting this group of physicians alone to pay the tax. it appears simply that this group of physicians has the closest temporal relationship, in terms of licenses issued or renewed, to the October 1 effective date. This allocation of the tax burden is purely arbitrary. The funds in question are designated for the general treasury of the State, not for the regulation of the profession of medicine.

In essence, the State is imposing a general tax on a small group allocated solely by reason of their profession and birthdates. If this is constitutional legislation, one supposes that the next time the State needs an extra $5 million or so, it will impose a tax of $300.00 on, say, bartenders born between March 1 and June 30. If the State's argument here has any weight, there is little to stop them.

ii. The classes created by the 1993 Amendment do not help the State acquire federal Medical Assistance funds.

Under section 1903 of the Social Security Act (42 U.S.C. 1396b et seq), Minnesota may obtaining matching funds from the United States Government pursuant to a formula based on the amount of money the state spends for medical assistance. In order to receive these funds, the dollars must be raised by Minnesota uniformly within classes of health care providers. (42 U.S.C. 1396b(w) (3) (B) and (3)(C)). These classes of providers are: inpatient hospitals, outpatient hospitals, nursing care facilities, mentally retarded care facilities, physicians, home health care services, prescription drugs and HMO's (42 U.S.C. 1396b(7)).

These classes of health care providers are similarly situated relative to the state's ability to raise matching funds.

By assessing the surcharge on any of these classes, the state would raise the matching funds exactly as well as by surcharging physicians. They are treated differently by the 1993 Amendment, which retroactively assesses the surcharge only on a sub-class of one of the provider classes, physicians. In order to survive equal protection scrutiny, Defendants must show that isolating a select group of physicians to contribute the funds to be matched is rationally related to obtaining the matching funds.

Isolating the physicians does not enable the state to obtain matching funds. In fact, it militates against that purpose because it is not "broad based any uniform" within the physician class. Also the federal law is no basis for the retroactive selection of physicians alone to bear a shortfall in funds raised from all health care providers. There is no reason demonstrated to isolate the physicians to retroactively contribute the matching funds. Rewarding the other classes for past contributions, by not imposing the surcharge, is not a legitimate state purpose. Hooper at 472 U.S. 612, citing Zobel at 457 U.S. 63.

The 1993 Amendment creates arbitrary classes which are not rationally related to a legitimate state interest, thus does not survive scrutiny under the rational basis test. It is void as an unconstitutional violation of the Equal Protection principles.

CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that this Court grant their motion for summary judgment and deny Defendants' motion.

LOMMEN, NELSON, COLE &
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Dated: June 30, 1993 By s/s

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STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL
DISTRICT

Dr. Frank A. Ubel, M.D., and Dr. Howard Anderson M.D., each individually and as members of a class of persons similarly situated,

Plaintiffs/Class Representatives,

v.

State of Minnesota, Minnesota Board of Medical Practice, and Minnesota Department of Human Services,

Defendants.

NOTICE OF APPEAL TO COURT OF APPEALS

Trial Court Case No. DC MC 93-001114

Date Judgment Entered: December 3, 1993

Please take notice that the above-named Plaintiffs/Class Representatives appeal to the Court of Appeals of the State of Minnesota from a judgment of the court entered on the date shown.

Dated: February 10, 1994

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STATE OF MINNESOTA

IN COURT OF APPEALS

Dr. Frank A. Ubel, M.D., and Dr. Howard Anderson M.D., each individually and as members of a class of persons similarly situated,

Appellants/Plaintiffs Class Representatives,

v.

State of Minnesota, Minnesota Board of Medical Practice, and Minnesota Department of Human Services,

Respondents/Defendants.

STATEMENT OF THE CASE OF APPELLANTS

Trial Court Case No. DC MC 93-001114

Appellate Court Case No. _____

---

1. **Court or agency of case origination and name of judge or hearing officer who presided.**

   Hennepin County District Court, Fourth Judicial District, The Honorable Harvey C. Ginsberg presiding.

2. **Jurisdictional statement.**

   This is an appeal from a final judgment entered on December 3, 1993 and this appeal is made pursuant to

Rule 103.03(a) of the Minnesota Rules of Civil Appellate Procedure.

3. **State type of litigation and designate any statutes at issue.**

Class action; Minn. Stat. § 147.01, subd. 6; the Minnesota and United States Constitutions.

4. **Brief description of claims, defenses, issues litigated and result below.**

In late 1991, the Minnesota Legislature enacted Minn. Stat. § 147.01, subd. 6. The law became effective October 1, 1992. In November 1992, Defendant, Minnesota Medical Practice Board (the Board) issued surcharge invoices to physicians whose licenses were issued or renewed between April 1, 1992 and September 30, 1992, and who held active licenses on October 1, 1992. Defendant, Minnesota Department of Human Services, collected the billed amounts and deposited them into the general fund of the Defendant State of Minnesota. Appellants/Plaintiffs are the class of all physicians whose licenses to practice medicine in Minnesota were issued or renewed between April 1, 1992 and September 30, 1992, who were assessed and paid the surcharge under Minn. Stat. § 147.01, subd. 6. On January 11, 1993, Appellants served a Complaint against Respondents/Defendants alleging that the imposition of the surcharge on Appellants/Plaintiffs constituted an improper application of Minn. Stat. § 147.01, subd. 6. Appellants seek a refund of the payments collected by Defendants/Respondents.

While cross-motions for summary judgment were pending, the Minnesota Legislature amended Minn. Stat.

§ 147.01, subd. 6. Section 6 sought to apply the 1992 surcharge to members of the Plaintiff class and stated that it was intended to "clarify the original intent of the statute amended." Further, the Legislature sought to legislate the outcome of this lawsuit by applying the 1993 amendment to "pending cases," even though the surcharge is unrelated to the civil justice system. By Order dated November 29, 1993, the trial court granted Defendants/Respondents' motion for summary judgment. Final judgment was entered on December 3, 1993. It is from that final judgment that Appellants bring this appeal.

5. Issues proposed to be raised on appeal.

a. Whether the trial court committed error in granting Respondents/Defendants summary judgment.

b. Whether the Respondents/Defendants have a right to assess the license renewal surcharge, effective October 1, 1992, on physicians who renewed their licenses before that date.

c. Whether the 1993 amendment to Minn. Stat. § 147.01 is unconstitutional.

d. Whether the 1993 Legislature may, consistent with constitutional constraints of due process and equal protection, single out the Appellants/Plaintiffs class, for the retroactive imposition of a professional license surcharge where no advance notice was provided that the surcharge was impending.

6. Is transcript required? If so, full or partial transcript?

No transcript is required.

7. **Is oral argument requested? If so, is argument requested at location other than that provided in Rule 134.09, subd. 2?**

   Yes, oral argument is requested; Ramsey County.

8. **Are formal briefs necessary?**

   Formal briefs are necessary.

9. **Names, addresses, zip codes and telephone numbers of attorneys for appellant and respondent.**

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C7-94-300

STATE OF MINNESOTA
IN COURT OF APPEALS

Dr. Frank A. Ubel, M.D.,
and Dr. Howard Anderson, M.D.,
each individually and as members
of a class of persons similarly situated,

Appellants/Plaintiffs
Class Representatives,

v.

State of Minnesota,
Minnesota Board of Medical Practice and
Minnesota Department of Human Services,

Respondents/Defendants.

BRIEF AND APPENDIX OF APPELLANTS

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STATEMENT OF THE ISSUE

WHETHER RESPONDENTS, IN ACCORD WITH EITHER THE 1992 OR 1993 VERSION OF MINN. STAT. § 147.01, SUBD. 6, WERE AUTHORIZED AND WERE CONSTITUTIONALLY PERMITTED UNDER EITHER THE U.S. OR MINNESOTA CONSTITUTIONS TO COLLECT THE PHYSICIAN LICENSE SURCHARGE FROM APPELLANT CLASS.

The trial court held in the affirmative and granted Respondents summary judgment.

was being imposed on licenses issued or renewed between April 1 and September 30, 1992.

If the 1993 Legislature believed that the 1992 statute could fairly be read to have provided that notice, it had no need to single out Appellant Class and deny them the benefit of advance notice otherwise conferred on every other person in Minnesota who either renews or is issued a medical license after enactment of the 1993 amendment.

If the Court concludes that the 1993 amendment is in fact a change in the law, then the Court must focus on the application of the 1993 statute to Appellant Class. If the Court concludes, as Respondents have argued, that the 1993 statute did not "change" the law, then a very serious constitutional issue confronts the courts of this State. Such an enactment, if it does not change the law, violates Article III of the Minnesota Constitution and is without effect.

6. Is the 1993 amendment unconstitutional?

Article III of the Minnesota Constitution prohibits the respective branches of government from exercising "any of the powers properly belonging to either of the others except in the instances specifically provided in this Constitution." Minnesota Constitution Article III, section 1. When the Legislature "exercises powers not properly belonging to the legislative, but to the judicial department of the government, then the act is in contravention of the Constitution and void." Sanborn v. Commissioners of Rice County, 9 Minn. 273 (Gil.) 258, 262-63 (1864); see Metropolitan Sports Facilities Comm. v. General Mills, Inc., 470 N.W.2d 118, 124-5 (Minn. 1991).

Statutory construction is a judicial, not a legislative, function. Under the separation of powers doctrine, the legislative branch has the power to enact the law, while the power to interpret the law is reserved for the judicial branch. In Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803),

the United States Supreme Court stated, "it is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule." While the legislative branch has the power to change the law, it does not have the power to usurp the powers delegated to other branches. Mistretta v. United States, 488 U.S. 361, 382 (1989).

It is hornbook law that the Legislature "has no power to direct the judiciary in the interpretation of existing statutes." 16 Am. Jur. 2d § 331 Constitutional Law, p. 870; Roosevelt Raceway, Inc. v. Monaghan, 174 N.E.2d 71 (N.Y. 1961), motion denied, 176 N.E.2d 502 (N.Y. 1961), app. dismissed, 368 U.S.12 (1961); California Employment Stabilization Com. v. Chichester Transp. Co., 172 P.2d 100, 101 (Cal. App. 1946); Johnson v. Morris, 557 P.2d 1299, 1303 (Wash. 1976). The Legislature has no power to declare retroactively that an existing statute will be given a certain construction when such a construction is contrary to that which the statute would ordinarily receive. See Monaghan, 174 N.E.2d at 75; Levy v. Industrial Fin Corp., 276 U.S. 281, 284 (1928).

Likewise, the Minnesota Supreme Court has held that a later Legislature has no authority to construe the intent of an earlier Legislature. See Bingham v. Supervisors of Winona County, 8 Minn. R. 441, 8 Minn. (Gil) 390 (1863); Anderson v. Firle, 174 Minn. 333, 219 N.W. 284, 285 (1928). The Bingham court stated, "it is only the in tent of the legislature which enacts a statute which is to govern courts in the construction thereof. The opinion of a subsequent legislature upon the meaning of a statute is entitled to no more weight than that of the same men in a private capacity." Bingham, 8 Minn. (Gil) at 398. The Anderson court recognized "the rule that one Legislature is not the interpreter of the laws enacted by a prior Legislature." Anderson, 219 N.W.2d at 285. Thus, it is clear that amendments to the statute by the 1993

Legislature cannot be used in construing the intent of the 1991 Legislature.[4]

The Minnesota Supreme Court has noted that while it desires to work in harmony with the legislative and executive branches of government, it "cannot and should not abdicate [its] judicial responsibility by failing to assert [its] inherent right to perform a function which is clearly judicial, however unpleasant it may be to assert that right." Sharood v. Hatfield, 296 Minn. 416, 210 N.W.2d 275, 280 (1973).

The Ninth Circuit in Seattle Audobon Society v. Robertson, 914 F.2d 1311, 1315 (9th Cir. 1990), rev. on other grounds, __U.S.__, 112 S.Ct. 1407 (1992), succinctly summarized the principle governing the distinction between constitutionally permissible and constitutionally impermissible legislative action with regard to pending litigation:

> The critical distinction, for purposes of deciding the limits of Congress authority to affect pending litigation through statute, is between actual repeal or amendment of the law underlying the litigation, which is permissible, and the actual direction of a particular decision in a case without repealing or amending the law underlying the litigation, which is not permissible.

Thus, the Legislature can amend or repeal any law but it "cannot prescribe a rule of decision where no new circumstances have been created by legislation." Id. See, e.g., United States v. Klein, 80 U.S. (13 Wall) 128 (1872)

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[4] Appellant Class admits that the Minnesota Supreme Court has been less than clear or consistent in its enunciation of the law in this area. Contrast the above cited cases with Pirkov-Middaugh By and Through Middaugh v. Gillette Children's Hosp., 495 N.W.2d 608, 611 (Minn. 1993). This issue is of overwhelming importance to all litigants in this State and demands scrutiny and clarification.

(Congress does not have the power to prescribe rules of decision for cases pending before the judicial branch).

The fundamental power to construe the statute at issue here belongs only to this Court. In contravention of the Constitution, the 1993 Legislature enacted into law its own interpretation of the 1992 statute by which it seeks to govern the courts. The purpose of the 1993 amendment was to construe the statute and "clarify the original intent of the statute amended," as the 1993 Legislature understood the 1991 Legislature's intent. This statutory construction is beyond the Legislature's power and is an exercise of power properly belonging only to the judicial branch. It is this Court's duty to find the Legislature's 1993 actions to be an impermissible constitutional invasion by the legislative branch into functions that are judicial. Therefore, it is null and void. See Sharood, 210 N.W.2d at 282.

What if the 1993 Legislature had enacted the following statute: "In the case of Ubel v. State of Minnesota, Minn. Stat. § 147.01, subd. 6, (1992) shall be interpreted by the courts as imposing the surcharge on those physicians whose licenses were issued or renewed between April 1 and September 30, 1992." Is there any doubt that the enactment of that statute constitutes a constitutionally impermissible exercise of a judicial function by the Legislature? What the Legislature did in 1993 is not materially different. In 1993 the Legislature did nothing more than tell the judiciary how to interpret the 1992 version of the statute with respect to all "pending cases." This case is the only pending case. The Legislature was performing a judicial, not a legislative, function and its enactment is void.

One cannot overemphasize the importance of this issue to all residents of the State of Minnesota. If this Court concludes that the Minnesota Legislature has the authority to declare -- i.e. interpret -- what the intent was of a prior Legislature, then the judiciary of this State no longer is the sole interpreter of Minnesota laws. Controversies between the parties over

statutory interpretation will be decided by the Legislature, not the courts. The party with the strongest lobby in the Minnesota Legislature will simply ask the Legislature to "adjudicate" the issue between the parties.

This Court must decide whether it is going to abdicate its judicial responsibility by failing to assert its inherent right to perform a function which is clearly judicial.

II. APPLICATION OF THE 1993 STATUTE OR THE 1992 STATUTE TO APPELLANT CLASS IS UNCONSTITUTIONAL.

As previously set forth, the 1992 statute does not apply and cannot authorize Respondents' actions. If the Court concludes the 1993 statute amended the law and is therefore not void as an unconstitutional attempt to wield judicial power, then this Court must analyze this case and that statute under the due process and equal protection guarantees of the Minnesota and United States Constitutions. This same due process and equal protection analysis applies if this Court should conclude the 1992 version is applicable and may be retroactively applied.

A. The 1993 Amendment and the 1992 Version if Applied Retroactively Violate Principles of Due Process and Constitutionally Impair Appellant Class, Protected Property Rights.

The 1993 amendment and the 1992 version (if deemed to apply retroactively) violate due process guarantees contained in the United States and Minnesota Constitutions.

Statutes are presumed to be constitutional. Minn. Stat. 645.17(3); Guilliams v. Comm'r of Revenue, 299 N.W.2d 138, 142 (Minn. 1980). The party challenging the constitutionality of a statute must demonstrate beyond a reasonable doubt that

it is unconstitutional. John Hancock Mut. Life Ins. Co. v. Commissioner of Revenue, 497 N.W.2d 250, 253 (Minn. 1992). The United States Constitution's Fourteenth Amendment and Article I, Section 7, of the Minnesota Constitution both prohibit the State from depriving any person of life, liberty, or property without due process of law. The due process protection provided under both Constitutions is identical. Sartori v. Harnischfeger Corp., 432 N.W.2d 448, 453 (Minn. 1988).

The illusive concept of a property interest has been routinely explained in these terms:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

Cable Communications Board v. Nor-West Cable Communications Partnership, 356 N.W.2d 658, 666 (Minn. 1984) (quoting Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Fleshing out this approach, the Minnesota Supreme Court has noted: "[a] protected property interest is created when the governing state law gives an individual 'entitlement' that is only removable for cause." Schocker v. State Dep't of Human Rights, 477 N.W.2d 767, 770 (Minn. Ct. App. 1991), rev. denied (citing Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 11-12 (1978). "A vested right . . . means some right which has been fixed or established." Olsen v. Special School Dist. No. 1, 427 N.W.2d 707, 711 (Minn. Ct. App. 1988).[5]

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[5] The phrase "vested right" is not found in the Constitution. Commentators and the courts have recognized that focusing on the concept of "vested rights" does nothing more than state due process conclusions and is unnecessarily confusing. Rather, the focus should be

1. Appellant Class has Protected property interests.

Practice of a profession is a property right protected by the Fourteenth Amendment. Barry v. Barchi, 443 U.S. 55, 63 (1979) (Barchi had a property right in his license sufficient to invoke protection of due process clause); In re Haukebo, 352 N.W.2d 752, 754 (Minn. 1984). In Minnesota, a property interest in a license or permit vests upon meeting the requirements necessary to obtain that license or permit. See Waste Recovery Co-op. v. County of Hennepin, 504 N.W.2d 220, 227 (Minn. Ct. App. 1993) (WRC and PRI may have constitutionally protected property interest in the directories and licenses); State v. Simms, 1993 WL 302105 (Minn. Ct. App. 1993), rev. denied (A.45) When the State renewed Appellant Class' medical licenses, Appellant Class acquired a protected property interest for the term of that license.

Further, prior to the assessment of the surcharge, each Appellant had established a right to the $400 in their possession. This property interest is also constitutionally protected. K.E. v. Hoffman, 452 N.W.2d 509 (Minn. Ct. App. 1990), rev. denied.

The trial court made no due process analysis based on its conclusion that Appellant Class had no protected property right in their license renewal. (A.39) The trial court's analysis is faulty in that it ignores the fact that the surcharge was being retroactively imposed on those who had fully complied and had obtained their licenses for 1992. Having met the renewal requirements and having obtained the renewal they indeed had a vested right in their renewed licenses. See Barry, 443 U.S. at 63.

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on due process. Pacific Mut. Life Ins. Co. v. First Republicbank Corp., 997 F.2d 39, 46-47 (5th Cir. 1993), reh'g denied, and treaties cited therein.

2. The 1993 amendment is unconstitutional because it retroactively impairs the Protected property rights of Appellant Class.

a. **Standard to be applied.**

Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it deprives citizens of legitimate expectations and upsets settled transactions. For this reason, "the retroactive aspects of [economic] legislation, . . . must meet the test of due process: a legitimate legislative purpose furthered by rational means." Pension Ben. Guaranty Corp. v. R. A. Gray & Co., 467 U.S. 717, 730 (1984). The United States Supreme Court has recognized that retroactive legislation does have to meet a burden not faced by legislation that has only future effects. "It does not follow . . . that what Congress can legislate prospectively it can legislate retrospectively. The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16-17 (1976). The burden is on one complaining of a due process violation to establish that the Legislature has acted in an arbitrary and irrational way. Id. at 15.

Judicial review of economic legislation under the due process clause is limited to a determination as to whether the legislation represents a rational means to a legitimate end. Turner Elkhorn Mining Co., 428 U.S. at 18-19. The rationality of a retroactive legislative enactment is determined by a comparison of the problem to be remedied with the nature and scope of the burden imposed to remedy that problem. Nachman Corp. v. Pension Ben. Guaranty Corp., 592 F.2d 947, 960 (7th Cir. 1979), aff'd, 446 U.S. 359 (1980)

b. **Legislature has acted arbitrarily.**

When one looks at the equities of imposing the retroactive surcharge on Appellant Class, it is clear that the Legislature has acted in an arbitrary and irrational way. Minnesota was raising money for its "general fund." The funds in question are designated for the general treasury of the State, not for the regulation of the profession of medicine. While raising money for the State's general fund may itself be a legitimate purpose, there is no competent explanation of why meeting this need may constitutionally be imposed selectively and retroactively on physicians born between April 1 and September 30 and physicians entering practice initially between April 1, 1992 and September 30, 1992. It is arbitrary and irrational to select roughly one-half of the State's physicians on the basis of birth date and initial license date to raise over $2 million for the State's general fund.

When the 1993 amendment was passed, physicians renewing or receiving a license since October 1, 1992, were already being surcharged. The 1993 amendment selected a group -- physicians -- and required them alone to pay a surcharge on licenses already issued or renewed. Then, within this class, it imposed a burden only on those whose licenses were issued or renewed between April 1 and September 30, 1992. The trial court concluded that the purpose was to raise a larger sum of money than would be raised by surcharging from October 1, 1992. No one has ever explained why the need to raise more money justified selecting this group of physicians alone to pay the tax. It appears simply that this group of physicians has the closest temporal relationship, in terms of licenses issued or renewed, to the October 1 effective date. It is clearly unfair and therefore arbitrary to force Appellant Class physicians to pay a surcharge in 1992 while

allowing the remainder to avoid the surcharge. This allocation of surcharge burden is purely arbitrary.[6]

In essence, the State is imposing a general tax on a small group allocated solely by reason of their profession and birth dates. If this is constitutional legislation, one supposes that the next time the State needs an extra $5 million or so, it will impose a tax of $300 on, say, bartenders born between March 1 and June 30. Further, if Respondents can assess $400 retroactively, what stops them from retroactively assessing $4,000 or $40,000? If the State's argument here has any weight, there is little to stop them.

Application of Minn. Stat. § 147.01 to Appellant Class interfered with the legally induced and settled expectation of Appellant Class that upon complying with the law in effect when they renewed their licenses in 1992, no further burden would be placed upon them based on that renewal. Notice is a relevant consideration in determining whether due process requirements are met. See United States v. Darusmont, 449 U.S. 292 (1981). The retroactive legislation does not satisfy due process requirements because Appellant Class had no notice of changing legal circumstances and had no opportunity to conform their conduct to the requirements of the new legislation. In the future physicians can and will make the decision to renew their licenses with knowledge of the surcharge. Physicians in Appellant Class did not have the opportunity to make that choice.

It is unconscionable that the State could apply a charge without giving the licensee the opportunity to avoid the charge

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[6] A substantial question of equal protection is raised by the imposition of this "tax" on physicians alone. The tax is for the general fund of Minnesota. Why are physicians alone selected to pay it? Why not bartenders, bankers or high school teachers? This issue is not peculiar to Appellant Class alone and is not raised for decision in this case except to underscore the suspect nature of this surcharge scheme from any perspective.

by not renewing the license. The 1993 Legislature by enactment of the companion statute requiring a notice requirement has admitted that this Appellant Class had no advance notice that the license surcharge would be retroactively applied to it.

Furthermore, although physicians in the past had been exposed to a license fee, this new and more burdensome legislation is not even closely akin in type and scope to the prior regulations governing physicians. At no time before this surcharge were physicians assessed a fee that was designated for the general treasury of the State, rather than for the regulation of the practice of medicine. To so impose this burden with no notice violates due process.

B. The 1993 Amendment Violates Equal Protection Principles Because it Divides Physicians Into Two Arbitrary Classes, Which are not Rationally Related to a Legitimate State Interest.

Appellant Class asserts that the statute as initially enacted and as amended violates both the State equal protection clause, Minnesota Constitution Article 1, Section 2, and the federal equal protection clause, U.S. Constitution Amendment XIV, Section 1.

1. Standard to be applied.

In State v. Russell, 477 N.W.2d 886, 888-89 (Minn. 1991), the Minnesota Supreme Court articulated a rational basis test under the Minnesota Constitution which is different and more stringent than its federal counterpart. That test requires:

> (1) the distinctions which separate those included within the classification from those excluded must not be manifestly arbitrary or fanciful but must be

genuine and substantial, thereby providing a natural and reasonable basis to justify legislation adapted to peculiar conditions and needs;

(2) the classification must be genuine or relevant to the purpose of the law; that is there must be an evident connection between the distinctive needs peculiar to the class and the prescribed remedy; and

(3) the purpose of the statute must be one that the State can legitimately attempt to achieve.

Id. at 888. Accordingly, this Court must apply a more stringent standard of review, as a matter of State law, under our State constitutional equivalent to the equal protection clause. State v. Russell, 477 N.W.2d at 889; see also Mitchell v. Steffen, 487 N.W.2d 896, 904 (Minn. Ct. App. 1992), aff'd 504 N.W.2d 198 (1993), cert. denied, __U.S.__, 114 S.Ct. 902 (1994).

The equal protection clause of the Fourteenth Amendment commands that "no state shall deny to any person within its jurisdiction the equal protection of the laws which is essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985). In order to satisfy equal protection requirements under the federal Constitution, all classes created by statute must be reasonably related to a legitimate State interest. Id. "The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." Id. at 446. Under either the federal standard of rational basis or the stricter state standard the legislation cannot stand.

The trial court does not appear to have analyzed Appellant Class' equal protection argument under the more stringent standard of review of the Minnesota Constitution.

Further, the trial court refuses to acknowledge that the surcharge is being retroactively applied to Appellant Class. The trial court's analysis is based on a prospective application, not a retroactive application.[7] When one views this legislation as being applied retroactively, the equal protection problem is apparent.

2. Statute violates equal protection guarantees.

The 1993 amendment violates equal protection principles which guarantee that similar people will be dealt with in a similar manner. Class legislation is prohibited if it creates arbitrary classes which are not rationally related to a legitimate State interest. The 1993 amendment is unconstitutional because it creates such classes in violation of the equal protection clauses of the United States and Minnesota Constitutions.

In this case, of course, Minnesota was raising money for its "general fund." Minn. Stat. § 147.01, subd. 6. While raising money for the State's general fund is itself a legitimate purpose, no competent explanation of why meeting this need may constitutionally be imposed selectively and retroactively on physicians born between April 1 and September 30 and physicians entering practice initially between April 1, 1992 and September 30, 1992 has been offered. No rational basis for selection of this class comes to mind or is itself suggested in the statute.

Here a retroactively selected subgroup of physicians has been assessed a $400 surcharge. The benefit of the funds raised from the small group, however, is distributed among all Minnesotans because its purpose was to "enhance" the State's "fiscal integrity." The only argument offered for the selection

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[7] Based on the trial court's prospective application, the trial court creates a new equal protection dilemma.

is that in 1992 a prospective surcharge, broadly based, was imposed on health care providers generally. Oddly, this argument neglects to account for the fact that Appellant Class like everyone else is subject to the surcharge when they subsequently renew their licenses. The class could not have been selected because of some exemption conferred upon it by the previous law.

The Attorney General has described three purposes for the 1993 legislation. First, it advises that "the Legislature has determined to utilize provider surcharges to enhance the financial integrity of the State." (Defendants' Supplemental Response, July 1993, p. 17) If so, charge all providers equally.

Second, the Attorney General has told us that the surcharge fund was revised to meet a federal requirement enacted in 1991 "that states use a broad based and uniform method of surcharging providers and prohibiting a direct payback of the surcharge to providers." (March 18, 1993 Memorandum at p. 3) If this is true, selecting this class of physicians is hardly a "broad based and uniform" method of surcharging health care providers.

Third, the Attorney General confesses in his June 15, 1993 Memorandum at page 9 that the 1993 statute was a reaction to this lawsuit. Apparently the 1993 Legislature selected this class because it complained.

None of these claimed purposes rationally relates to selecting approximately one-half of the State's physicians on the basis of birth date and initial license date to raise about $2 million for the State general fund.

The United States Supreme Court has consistently invalidated statutes which create class distinctions unrelated to legitimate state interests. Statutes are unconstitutional, for example, if they retroactively provide different levels of benefits based on the dates citizens establish residence in the state. Zobel v. Williams, 457 U.S. 55 (1982) (statute denies equal protection when it provides disparate benefits based on

length of residency); Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985) (a statute granting tax benefits to Vietnam War veterans based on the date of inception of state residency denies equal protection). In those cases, the United States Supreme Court made it clear that statutes retroactively creating fixed permanent distinctions are not constitutional. Other examples of statutory unconstitutionality on the rational basis test are those creating classes based on mental retardation (Cleyburne, supra), foreign residency of business owners (Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985), reh'g denied, 471 U.S. 1120 (1985) and extended families (Village of Belle Terre v. Boraas, 416 U.S. 1 (1974)).

The Hooper and Zobel cases are most instructive here. These cases establish "when a statute distributes benefits unequally, the distinction it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment." Hooper, 472 U.S. at 618. "Zobel made clear that the Constitution will not tolerate a state benefit program that creates fixed, permanent distinctions ... between ... classes and of concededly bona fide residents, based on how long they have been in the State." Hooper, 472 U.S. at 623.

The Hooper case also held that "singling out previous residents for the tax exemption, rewards only those citizens for their 'past contributions' toward our Nation's military effort in Vietnam. Zobel teaches us that such an objective is not a legitimate state purpose.'" Hooper, 472 U.S. at 623. "The only apparent justification for the retrospective aspect of the program, 'favoring established residents over new residents,' is constitutionally unacceptable." Zobel, 457 U.S. at 65.

Although these cases deal specifically with conferring a selective benefit on the basis of retroactive criteria rather than imposing a charge on such a basis as in the instant case, the distinction is not material for the purpose of analysis. If length of state residency is not rationally related to tax benefits conferred on a retroactively defined class, what can be said

about a profession and birth date as a retroactive criteria for a selective tax to "enhance the financial integrity of the State?"

The constitutionally invalid distinctions discussed are less arbitrary than the two classes created by the 1993 amendment. Further, under the Minnesota Constitution, which analyzes such legislation much more stringently than its federal counterpart, there is no question that the statute fails for a lack of a genuine and substantial distinction between those inside and outside the class. State v. Russell, 477 N.W.2d at 889.

The transparent purpose of the 1993 amendment is to help Respondents win this lawsuit. Adjudicating the winner of the case is a judicial, not a legislative, function. Respondents allude to two other purposes for the 1993 amendment. The first is to raise money for the State's general fund and the second, stated only indirectly, is to acquire additional matching funds from the federal government. The classes created by the 1993 amendment are not rationally related to either purpose. There is no characteristic of Minnesota physicians which makes it reasonable for them to carry the entire burden of replenishing the State's depleted coffers. Nor is there a rational basis to isolate physicians, out of all health care providers, to bear the burden required to obtain federal medical assistance benefits shared by the Minnesota health care industry.

When the 1993 amendment was passed, physicians renewing or receiving a license since October 1, 1992 were already being surcharged. The 1993 amendment selected a group -- physicians -- and required them alone to pay a surcharge on licenses already issued or renewed. Then, within this class, it imposed the burden only on those whose licenses were issued or renewed between April 1 and September 30, 1992. Respondents argue that the purpose was to raise a larger sum of money than would be raised by surcharging from October 1, 1992. Respondents do not explain why the retroactively determined need to raise more money justified

selecting this group of physicians alone to pay the tax. It appears simply that this group of physicians is the closest temporal relationship, in terms of licenses issued or renewed, to the October 1 effective date. This allocation of the tax burden is purely arbitrary. The funds in question are designated for the general treasury of the State, not for the regulation of the profession of medicine.

Under Section 1903 of the Social Security Act (42 U.S.C. 1396b, et. seq.), Minnesota may obtain matching funds from the United States government pursuant to a formula based on the amount of money the State spends for medical assistance. In order to receive these funds, the dollars must be raised in Minnesota' uniformly within classes of health care providers. 42 U.S.C. 1396b(w)(3)(B) and (3)(C). These classes of providers are: inpatient hospitals, outpatient hospitals, nursing care facilities, mentally retarded care facilities, physicians, home health care services, prescription drugs and HMO's. 42 U.S.C. § 1396b(7).

These classes of health care providers are similarly situated relative to the State's ability to raise matching funds. By assessing the surcharge in any of these classes, the State would raise the matching funds exactly as well as by surcharging physicians. Physicians are treated differently by the 1993 amendment, which retroactively assesses a surcharge only on a subclass of one of the provider classes, physicians. In order to survive equal protection scrutiny, Respondents must show that isolating a select group of physicians to contribute the funds to be matched is rationally related to obtaining the matching funds.

Isolating the physicians does not enable the State to obtain matching funds. In fact, it militates against that purpose because it is not "broad based and uniform" within the physician class. Also, the federal law has no basis for the retroactive selection of physicians alone to bear a shortfall in funds raised from all health care providers. There is no reason

demonstrated to isolate the physicians to retroactively contribute the matching funds. Rewarding the other classes for past contributions, by not imposing the surcharge, is not a legitimate State purpose. Hooper, 472 U.S. at 622, citing Zobel, 457 U.S. at 63.

The 1993 amendment creates arbitrary classes which are not rationally related to a legitimate State interest and thus does not survive scrutiny under the rational basis test. It is void as unconstitutional violative of the equal protection principles.

Finally, under the trial court's interpretation of the statutes, Appellant Class is required to pay $800 when they renew their licenses for the first time after the effective date of the statute -- $400 as of October 1, 1992 and $400 again when they renew in April through September 1993 -- while those who renewed after October 1, 1992 only pay $400. This raises an additional equal protection argument.

On what possible basis can one group of physicians be obligated to pay $400 more than any other group of physicians similarly situated? No possible support can exist for the creation of a surcharge that adversely affects one group of physicians over another. There is no question that the statute is based on an "arbitrary rather than a genuine and substantial distinction." State v. Russell, 477 N.W.2d at 890. It violates equal protection guarantees.

CONCLUSION

If the Court concludes that only the 1992 version of 147.01, subd. 6, applies, the judgment must be reversed and judgment ordered entered in favor of Appellant Class in that the statute did not authorize Respondents to collect the surcharge from Appellant Class. If the Court concludes the 1992 version retroactively so authorized, the judgment must be reversed in that the enactment violates the due process

and/or equal protection clauses of the U.S. and Minnesota Constitutions.

C7-94-300

STATE OF MINNESOTA
IN SUPREME COURT

Dr. Frank A. Ubel, M.D.,
and Dr. Howard Andersen, M.D.,
each individually and as members
of a class of persons similarly situated,

Appellants/Plaintiffs
Class Representatives,

v.

State of Minnesota,
Minnesota Board of Medical Practice and
Minnesota Department of Human Services,

Respondents/Defendants.

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STATEMENT OF THE ISSUES

I. WHERE AT THE TIME APPELLANT CLASS RENEWED OR WERE ISSUED THEIR LICENSES TO PRACTICE MEDICINE THERE WAS NO LEGAL OBLIGATION TO PAY A $400 SURCHARGE AND THEREAFTER RESPONDENTS, BASED ON MINN. STAT. § 147.01, SUBD. 6, WHICH WAS EFFECTIVE AFTER APPELLANT CLASS' RENEWAL OR ISSUANCE, ASSESSED AND COLLECTED FROM THE APPELLANT CLASS THE SURCHARGE BASED ON THEIR PRIOR LICENSE RENEWAL OR ISSUANCE, WHETHER THIS CONSTITUTES A RETROACTIVE APPLICATION OF THE STATUTE, NOT AUTHORIZED BY LAW, AND WHICH RETROACTIVE APPLICATION IS UNCONSTITUTIONAL.

The Court of Appeals held in the negative.

II. WHAT IS THE LEGAL EFFECT OF THE 1993 "AMENDMENT" TO MINN. STAT. § 147.01, SUBD. 6, AND IF IT HAS LEGAL EFFECT, DOES IT VIOLATE THE MINNESOTA AND FEDERAL CONSTITUTIONS?

The Court of Appeals did not address the 1993 amendment.

STATEMENT OF THE CASE AND FACTS

A. Statement of the Facts.

Petitioners/Plaintiffs Dr. Frank A. Ubel, M.D., and Dr. Howard Andersen, M.D., each individually and as members of a class of persons similarly situated (hereinafter Plaintiff Class), are physicians licensed by Respondent/Defendant Minnesota Board of Medical Practice (hereinafter Board) under Minn. Stat. Ch. 147 to practice medicine. Their medical licenses were either initially issued or renewed by the Board between April 1 and September 30, 1992. (A. 13) The Plaintiff Class represents approximately one-half of the physicians holding Minnesota licenses. The Plaintiff Class held their licenses to practice medicine as of October 1, 1992. Id.

In 1992, the 1991 Minnesota Legislature enacted Minn. Stat. § 147.01, subd. 6, with an effective date of October 1, 1992. That section states, in pertinent part:

> Subd. 6. License surcharge. In addition to any fee established under section 214.06, the board [of medical practice] shall assess an annual license surcharge of $400 against each physician licensed under this chapter as follows:
>
> (1) a physician whose license is issued or renewed between April 1 and September 30 shall be billed on or before November 15, and the physician must pay the surcharge by December 15; and
>
> (2) a physician whose license is issued or renewed between October 1 and March 31 shall be billed on or before May 15, and the physician must pay the surcharge by June 15.

> The board shall provide that the surcharge payment must be remitted to the commissioner of human services to be deposited in the general fund under section 256.9656. The board shall not renew the license of a physician who has not paid the surcharge required under this section. . . .

(A. 1-2) (Emphasis added.)

Minn. Stat. § 147.01, subd. 6 (1992), which was enacted on April 29, 1992 but which was not effective until October 1, 1992, contains no language applying it to physicians whose licenses were renewed prior to October 1, 1992. It is undisputed that when Plaintiff Class' licenses were issued or renewed in 1992, the Board had no statutory authority to impose the license surcharge. No notice of the surcharge was given to these physicians when they renewed or were issued their licenses. Nonetheless, in November 1992, the Board issued license surcharge invoices to physicians whose licenses had been issued or renewed between April 1, 1992 and September 30, 1992, billing them each $400 which was due December 15, 1992. (A. 3-4) Notice of the surcharge was provided with the invoice for payment of the surcharge. (A. 3-4). Plaintiff Class was informed that a penalty and interest would apply the day after the payment was due (up to 24% in the aggregate) and that the Board would not renew the license of a physician who did not pay the surcharge. Id. Plaintiff Class was also informed that there was nothing they could do to alleviate their liability for that surcharge. (A. 6, 8) Court action would be undertaken, where necessary, to collect the surcharge. (A. 7)

In other words, at the time Plaintiff Class' licenses were renewed between April 1, 1992 and September 30, 1992, there was no obligation to pay an additional $400 based on renewal. The renewal was valid without such payment. After these

physicians' licenses had been renewed, according to Respondents (and now the lower courts), Minn. Stat. § 147.01, subd. 6, obligated each member of Plaintiff Class to pay an additional $400 as a result of his or her prior 1992 license renewal.

The statutory surcharge is distinct from the license fee of $115. The license fee is an amount set to cover the expenses of the Board of Medical Practice. Minn. Stat. § 214.06; Minn. R. 5600.2500. The surcharge is, in essence, a tax collected by the Board but applied to the State's general fund. Minn. Stat. § 147.01, subd. 6.

Respondent Minnesota Department of Human Services collected the billed amounts. The monies collected were deposited into the general fund of the Respondent State of Minnesota. Minn. Stat. § 147.01, subd. 6. (A. 4)

B. Statement of the Case.

Plaintiff Class served a Complaint against Respondents alleging that the imposition of the surcharge on Plaintiff Class constituted an improper application of Minn. Stat. § 147.01, subd. 6. (A. 13) It should be noted that Plaintiff Class' core assertion has always been that the statute, by its terms, did not authorize a surcharge on renewals or initial issuances of licenses before its effective date. For that reason Respondents' action in imposing the surcharge on Plaintiff Class and threatening ruinous sanctions for nonpayment was beyond their legal authority or powers. (A. 16-17) Plaintiff Class claim they are entitled to recover the $400 surcharge extracted from them under threat that their eligibility to practice medicine in the future would be revoked because Respondents possessed no lawful authority to impose the charge on them. Plaintiff Class has argued that any contrary construction of the statute would render it retroactive by imposing a new obligation on a past, completed transaction. Since the statute does not clearly

and manifestly call for its retroactive application, any construction of it that has a consequence of making it retroactive must be shunned. Plaintiff Class argued that as a result of Respondents' actions, the State is currently in possession of monies to which it is not entitled. Plaintiff Class seeks a refund of the payments collected.

Plaintiff Class was certified as a class of all physicians whose licenses to practice medicine in Minnesota were issued or renewed between April 1, 1992 and September 30, 1992, and who were assessed and paid the surcharge under Minn. Stat. § 147.01, subd. 6. (A. 19)

In response to Plaintiff Class' Complaint, Respondents did not file an answer. Instead they filed a Rule 12 motion to dismiss. (A. 23) Respondents argued that the statute imposes a surcharge on all physicians holding a license to practice medicine on October 1, 1992. In other words, they argue the surcharge is imposed based on one's status as a licensed physician on October 1, 1992 and is not an annual surcharge triggered by the transaction of renewing one's license or having a license issued.

The position asserted by Respondents that status on October 1, 1992, as opposed to the licensing transaction, is the triggering event for the surcharge is contrary to the Attorney General's interpretation of that statute. When responding to a physician's questions concerning the license surcharge, the Attorney General stated, "The event that triggers the surcharge liability is the issuance or renewal of your license, even if your license is cancelled or you are granted emeritus status after that date." The Attorney General's letter further states that only the Plaintiff Class can undertake no action to avoid surcharge liability. (A. 7-8) The Attorney General stated that physicians, other than those in Plaintiff Class, could avoid their surcharge liability by (1) allowing their licenses to lapse through nonrenewal; or (2) resigning their licenses; or (3) completely retiring from the

practice of medicine and requesting emeritus registration. (A. 8)

While this case was pending before the district court on cross-motions for summary judgment, the 1993 Minnesota Legislature amended § 147.01, subd. 6, effective May 28, 1993. The portions of that amendment relevant to this case state:

> Sec. 6. Minnesota Statutes 1992, section 147.01, subdivision 6, is amended to read:
>
> Subd. 6. LICENSE SURCHARGE. In addition to any fee established under section 214.06, the board shall assess an annual license surcharge of $400 against each physician licensed under this chapter. The surcharge applies to a physician who is licensed as of or after the effective date of this section in Laws 1992 [October 1, 1992], and whose license is issued or renewed on or after April 1, 1992, and is assessed as follows: ...

(A. 9) (Emphasis added.)

The 1993 Legislature also stated the purpose of the amendment was not to change the law but to state the intent of the 1991 Legislature.

> Section 129. [LEGISLATIVE INTENT.]
>
> Sections 6 and 15, paragraph (b); and the amendment to paragraph (a), clause (3), in section 123, are intended to clarify, rather than to change, the original intent of the statutes amended.

(A. 11) The Legislature also provided that this amended statute would apply to this case.

Section 135. EFFECTIVE DATES,

Subd. 7. Sections 6 and 129 are effective the day following final enactment and apply to cases pending or brought on or after their effective date.

(A. 12) (Emphasis added.)

A companion statute was added to the surcharge statute, requiring the Board to provide notice to the physician in advance of the imposition of a surcharge on his/her license.

(f) The applicant shall pay A fee established by the board by rule. The fee may not be refunded. Upon application or notice of license renewal, the board must provide notice to the applicant and to the person whose license is scheduled to be issued or renewed of any additional fees, surcharges, or other costs which the person is obligated to pay as a condition of licensure. The notice must:

(1) state the dollar amount of the additional costs;

(2) clearly identify to the applicant the payment schedule of additional costs; and

(3) advise the applicant of the right to apply to be excused from the surcharge if a waiver is granted under section 256.9657, subdivision 16, or relinquish the license to practice medicine in lieu of future payment if applicable.

(A. 10) The Legislature did not grant Plaintiff Class the benefit of such notice requirements.[1]

As previously stated, it is the position of the Plaintiff Class that the 1992 statute plainly did not authorize the imposition of the $400 surcharge on the Plaintiff Class. Any application of this statute to Plaintiff Class constitutes retroactive application for which there is no clear and manifest intent by the Legislature and therefore Respondents' actions were not authorized by law. If the 1992 statute is deemed to so authorize collection from Plaintiff Class, then its retroactive application is unconstitutional under the due process and equal protection provisions of the Minnesota and United States Constitutions.

Further, the 1993 Legislature cannot cure Respondents' problem. The 1993 Legislature subsequently declared that its amendment "clarifies" the intent of the 1991 Legislature and "applies to cases pending," a surprising enactment since the statute does not direct itself at rules governing judicial remedies. One Legislature cannot legislate the intent of another Legislature. It is a judicial function to interpret statutes and therefore the legislative action violates the separation of powers provision in the Minnesota Constitution. Further, if it is the 1993 statute that applies to this case, that statute is unconstitutional in that its retroactive application violates the equal protection and due process clauses of the Minnesota and United States Constitutions.

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[1] It should be noted that the amendment to §147.01, subd. 6, which was obviously enacted at the instigation of Respondents, is not in accord with the position taken by Respondents before the lower courts. The amendment does not state that the license surcharge applies to all physicians "currently" licensed on October 1, 1992. Instead, it states that it applies to physicians who were licensed "as of or after" October 1, 1992 and whose licenses are issued or renewed on or after April 1, 1992. It also, by its notice provisions, ties the surcharge to the transaction of issuing or renewing medical licenses.

By final judgment entered December 3, 1993, the trial court, finding the 1992 statute ambiguous, reached the following conclusions of law: (1) that the Minnesota Legislature intended the physicians' license surcharge embodied in Minn. Stat. § 147.01, subd. 6, to be assessed and collected in 1992 from physicians whose licenses to practice medicine were issued or renewed between April 1, 1992, and September 30, 1992, and who held an active license on October 1, 1992; (2) that application of this statute and its amendment to Plaintiff Class is "not a retroactive operation of the Statute" and (3) Minn. Stat. § 147.01, subd. 6, and its "amendment is rationally related to a legitimate governmental purpose and does not violate equal protection principles." (A. 41, 27)

Plaintiff Class appealed from the final judgment to the Minnesota Court of Appeals, which by decision dated June 28, 1994, affirmed the district court. (A. 46) The Court of Appeals concluded that the 1992 version of the statute "plainly applies to all physicians currently licensed under Minnesota law." Concluding that since failure to pay the license surcharge would not affect a physician's current license but only destroy eligibility for renewal, the statute could not be construed as being retroactively applied to Plaintiff Class. (A. 47)

Even if application of the statute to Plaintiff Class was viewed as retroactive, the Court of Appeals concluded that because the Legislature selected October 1, 1992 as the effective date, and the "effective date immediately follows the end of the licensing period of those in the first group [referring to § 147.01, subd. 6(1)]," this "structure" indicates the Legislature "clearly and manifestly intended' retroactive application of this statute to Plaintiff Class. Finally, the Court of Appeals found no constitutional infirmity in application of the 1992 statute to Plaintiff Class. (A. 47) The Court of

Appeals did not address the 1993 amendment to § 147.01, subd. 6. Id.

Plaintiff Class sought further review which was granted by Order dated September 16, 1994. (A. 48)

ARGUMENT

I. INTRODUCTION

This case is confusing in that it was initially premised on the question of whether Minn. Stat. § 147.01 (1992) authorized Respondents to collect the surcharge from Plaintiff Class. While summary judgment motions were pending before the district court, the 1993 Legislature enacted a so-called amendment to § 147.01. The district court, in granting Respondents summary judgment, appears to have concluded that under both the 1992 and 1993 versions of the statute, Respondents had authority to collect the surcharge from Plaintiff Class and that such a collection was constitutionally permissible. The Minnesota Court of Appeals affirmed the district court but relied solely on the 1992 version of the statute. The Court of Appeals did not address the 1993 amendment. In addressing this case to this Court, Plaintiff Class will first address why such collection is not proper under the 1992 version. Plaintiff Class will then address why the 1993 version cannot constitutionally be applied.

II. RESPONDENTS' ASSESSMENT AND COLLECTION WAS NOT AUTHORIZED BY MINN. STAT. § 147.01 (1992).

A. Standard of Review.

This appeal arises out of the grant of summary judgment in favor of the Respondents. On appeal, this Court must apply

the same standard governing summary judgments as that applied by the district court. State by Cooper v. French, 460 N.W.2d 2, 4 (Minn. 1990), reh'g denied; Northbrook Ins. Co. v. American States Ins. Co., 95 N.W.2d 450, 453 (Minn. Ct. App. 1993). Pursuant to Rule 56 of the Minn. R. Civ. P., the court is to grant summary judgment when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Holiday Acres No. 3 v. Midwest Federal Sav. & Loan Ass'n, 308 N.W.2d 471, 480 (Minn. 1981). Summary judgment is proper where the parties do not dispute the facts but only dispute the application of the law to the facts. Fire & Casually Ins. Co. v. Illinois Farmers Ins. Co., 352 N.W.2d 798, 799 (Minn. Ct. App. 1984). On appeal, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted. Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993).

The material facts in this case are not in dispute. What is in dispute is the application of the law to the undisputed facts of this case. This case involves the 1992 version of Minn. Stat. § 147.01, subd. 6, and its 1993 amendment. The interpretation of a statute is a question of law, which this Court considers de novo. Hibbing Education Ass'n v. Public Employment Relations Bd., 369 N.W.2d 527, 529 (Minn. 1985). Similarly, a statute's constitutionality is a question of law, which this Court considers de novo. In re Blilie, 494 N.W.2d 877, 881 (Minn. 1993). Therefore no deference is owed to the district court and Court of Appeals decisions. Id.

B. The 1992 Statute Effective October 1, 1992, by its Terms, Does Not Impose a License Surcharge on Plaintiff Class for Their Licenses Issued or Renewed Prior to October 1, 1992.

1. Rules of statutory construction.

The issue before the Court involves a question of statutory interpretation. The first task in interpreting a statute is to simply examine the language of the statute itself. Swenson v. Emerson Elec. Co., 374 N.W.2d 690, 699 (Minn. 1985), reh'g denied, cert. denied 476 U.S. 1130 (1986). No room for judicial construction exists when the statute speaks for itself. Comm'r of Revenue v. Richardson, 302 N.W.2d 23, 26 (Minn. 1981).

Statutes are presumed not to have retroactive effect. Lieser v. Sexton, 441 N.W.2d 805, 807 (Minn. 1989). There must be a clear indication the Legislature intended the statute to be retroactive before this Court will give it such effect. Duluth Firemen's Relief Ass'n v. Duluth, 361 N.W.2d 381, 385 (Minn. 1985). Further, as this Court has recognized, the Legislature itself has said, "No law shall be construed to be retroactive unless clearly and manifestly so intended by the Legislature." Minn. Stat. §645.21 (1992), quoted in Baertsch v. Minn. Dept. of Revenue, 518 N.W.2d 21, 23 (Minn. 1994). Where the Legislature provides a specific effective date for the statute, this is "a clear manifestation the Legislature intended the statute to apply from that date forward." Id. at 23.

In construing a statute, the court cannot supply that which the legislature purposely omits or inadvertently overlooks. State v. Corbin, 343 N.W.2d 874, 876 (Minn. Ct. App. 1984). Where the failure of expression, rather than the ambiguity of expression, constitutes the vice of the statute, courts are not free to substitute amendment for construction and thereby supply the legislative omissions. State v. Moseng, 254 Minn. 263, 95 N.W.2d 6, 11-12 (1959).

In the absence of an ambiguity in the express language of a legislative enactment, the courts are not permitted to resort to extrinsic aids to determine legislative intent. "Extrinsic aids may be used to solve ambiguities which exist but cannot be used to create them." Minneapolis-St. Paul Sanitary Dist. v. St. Paul, 240 Minn. 434, 61 N.W.2d 533, 536 (1953).

"[W]hen the words of a law ... are clear from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit." Minn. Stat. § 645.16. Whether a statute is ambiguous is a question of law for the Court. See Hibbing Education Ass'n, 369 N.W.2d at 529.

2. 1992 Statute is not ambiguous.

a. Trial court's finding of ambiguity not supportable.

A finding of ambiguity can be made only if a statute lends itself to more than one reasonable interpretation. Tuma v. Comm'r of Economic Sec., 386 N.W.2d 702, 706 (Minn. 1986). In this case, the district court, based on the surcharge billing cycle set forth in the statute and the fact that the Legislature listed the billing cycle for physicians licensed between April 1 and September 30 first under part (1) of subd. 6, concluded the statute was ambiguous.

The trial court's inference of ambiguity based on the billing cycles borrows no authority from any rule of statutory construction or English grammar known to have ever been enunciated in any court decision, dictionary or text. If announced by this Court as a test for ambiguity, statutory construction will lose its rational hinge, its reliance on rules, and, most of all, its reliance on common sense.

More than one reasonable interpretation does not exist based simply on the order of the billing cycles (the trial court's conclusion) listed in the statute. The billing cycles do not serve to designate liability for the surcharge but solely the timing of the billing of the physician.[2] Revenue statutes are

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[2] The Court of Appeals inexplicably states that Plaintiff Class misconstrued the statute's purpose in dividing Minnesota physicians into two groups. (A. 47) Plaintiff Class has always argued that subds. 6(1) and (2) indicate merely the manner and time of billing. They do not

rarely, if ever, drafted by definitively excluding those not liable to pay the tax. Ambiguity cannot therefore be drawn from the absence of a statement in the statute that license renewals before the effective date are not surcharged.[3]

It is a fact that Plaintiff Class renewed before the surcharge was imposed on the license transaction. The statute manifests no intention to reach back and surcharge the past completed transactions. The date 1992 does not appear in the statute. As construed by the trial court, only some arbitrary restraint self-imposed by the Board stops it from surcharging license renewals, say, back to April 1, 1975. The Plaintiff Class is, in terms of the surcharge, in exactly the same position as every physician who has renewed a medical license from the outset of the licensing statutes -- they renewed before the surcharge was imposed.

b. Court of Appeals reached same conclusion but concluded statute was not ambiguous.

The Court of Appeals, in contrast to the district court, found the statute was not ambiguous. Nonetheless, the Court of Appeals concluded, as did the trial court, that the surcharge applies to Plaintiff Class.

The Court of Appeals concludes that because the statute says "the board shall assess an annual license surcharge of $400 against each physician licensed under this chapter" and it is effective October 1, 1992, therefore the statute imposes a surcharge on all physicians "currently" occupying the status as licensed physician on October 1, 1992. Under the Court of

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designate, as the lower courts conclude, liability for the surcharge on Plaintiff Class.

[3] For simplicity in expression, the term "renewed" or "renewal" should be taken here to embrace initially issued licenses as well.

Appeals' view the license surcharge is no longer an ongoing annual surcharge triggered by the event of issuance or renewal of a physician's license. Instead, the Court of Appeals has made it a tax based on one's status of being a licensed physician on October 1, 1992.

Silly results follow from the Court of Appeals' decision. Under the Court of Appeals' decision, every licensed physician as of October 1, 1992 must pay the surcharge annually while those issued licenses after October 1, 1992 are acquitted of liability. Moreover, those holding licenses on October 1, 1992 never shed their liability. They apparently must pay the fee annually until they die. If the Court of Appeals' rendition of the statute is correct, the surcharge may never be imposed on physicians not licensed on October 1, 1992. Such results are clearly outside the intent of the statute, and, in fact, do not represent the actual ongoing billing practices of the Board.

Further, what about the physician who renews his license on February 1, 1992 but elects to retire before his next renewal. The Court of Appeals would conclude he is nonetheless liable for the fee because of his licensure status on October 1, 1992.

Respondents have taken the position that this physician, even though licensed on October 1, 1992 would not be held liable for the surcharge because his license was not renewed between April 1, 1992 and September 30, 1992. (A. 8)

The Court of Appeals essentially concludes that based on the billing cycles in the statute (licenses issued or renewed between April 1 and September 30 will be billed on or, before November 15) and its October 1 effective date, the Legislature "clearly intended the statute to apply to those physicians who had renewed their licenses as of October 1, 1992." (A. 47) Any assertion that Plaintiff Class is identified in the first subdivision of § 147.01, subd. 6, is nonsense. The dates "April 1 and September 30, 1992" are not in the statute. Further, the Plaintiff Class consists of physicians who renewed

between April 1 and September 30, 1992 or who were initially licensed in that period. Therefore, only some of those Class members will incidentally fall into the group of physicians who renew in subsequent years between April 1 and September 30. Some will fall into the other billing group because their birth date determines the renewal cycle. See Minn. Rule 5600.0605.[4]

The billing cycle set forth in the statute is not specific to 1992 or any other year because the surcharge is a recurring transactional charge, not an annual tax on a static group. It is precisely the absence of any language manifesting intent to impose retroactive surcharge liability on renewals or issuances before the effective date that underscores the futility of Respondents' position. By the clear language of the statute, the surcharge is an ongoing annual fee attached to renewal and issuance of the license. The Attorney General has so acknowledged in its letter to physicians stating that "the event that triggers a surcharge liability is the issuance or renewal of your license." (A. 7) Liability for the surcharge fee is triggered by the issuance or renewal of the license, not licensure status on October 1, 1992. It is only triggering events on or after its effective date that can impose liability.

c. Decision contrary to the Court of Appeals' own past decisions.

The Minnesota Court of Appeals failed to apply the analysis it utilized in In re Estate of Hanson, 451 N.W.2d 364 (Minn. Ct. App. 1990); In re Estate of O'Keefe, 354 N.W.2d 531 (Minn. Ct. App. 1984), rev. denied, and In re Estate of

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[4] Some members of Plaintiff Class renewed their licenses between October 1, 1992 and March 31, 1993 and were liable for another $400 surcharge in June 1993 or $800 of surcharges in a six-month period. See Minn. R. 5600.0605.

Edhlund, 444 N.W.2d 861 (Minn. Ct. App. 1989). These cases concern the State's ability to recover medical assistance funds from the estates of deceased recipients. They are relevant to the instant case because they set forth the principle that the State's right to collect funds from an individual are determined by whether the event establishing the State's rights occurred before or after the effective date of the statute authorizing collection.

The analysis performed by the Minnesota Court of Appeals in the Hanson, O'Keefe and Edhlund cases (hereinafter the Court of Appeals' triggering event analysis) is simple. The court ascertains the effective date of the statute authorizing collection of the funds and compares it with the date of the event triggering the State's right to recover funds. If the triggering event occurred before the authorizing statute became law, the State may not collect the funds. When the triggering event occurs after the effective date of the statute, the State is authorized to collect the funds.

In the instant case, the triggering event is the renewal of the physicians' licenses. § 147.01, subd. 6, provides for an annual license surcharge on each license issued or renewed. In accord with the statute, the Attorney General has informed physicians that "the event that triggers the surcharge liability is the issuance or renewal of [the physician's] license, even if [that] license is cancelled . . . after that date." (A. 7).

The Court of Appeals ignored the triggering event analysis and concluded the physician's status -- i.e. "currently licensed physician" -- on the effective date of the statute determines the State's collection rights. This "status analysis" is inconsistent with the Hanson line of cases, which uses the triggering event analysis. The O'Keefe case makes it clear that "the determinative date for application of the retroactive standard is the death of the recipient of the aid." Hanson, 451 N.W.2d at 366-67, quoting Edhlund, 444 N.W.2d at 863. The recipient's death is the triggering event. If the Hanson court

had employed a status analysis, her status as a decedent on the effective date of the statute would have authorized, not prohibited, the State's recovery from her estate.

Applied to the Hanson line of cases, the lower courts' status analysis would prohibit the State from ever recovering medical assistance funds. The State has no right to recover those benefits until an individual dies. Ms. Hanson was dead, but the State's recovery was prohibited. The status of the parties in O'Keefe and Edhlund on the effective date of the statute was that they were both alive, therefore, under the status analysis, the State would be prohibited from recovering benefits paid.

The status analysis similarly fails when applied to the instant case. If license status on October 1, 1992, determines applicability of the surcharge, then physicians who subsequently retire will continue to be assessed the surcharge, while physicians licensed in 1993 and beyond will never be assessed. These unreasonable results were not intended by the Legislature and must not be read into the statute.

The triggering event analysis is more reasonable. When O'Keefe and Edhlund passed away, after the authorizing statute became law, the State's right to collect funds was triggered. The fact that Hanson died before the effective date of the statute prohibited the State from collecting from her estate. In the instant case, the State's right to collect is triggered by renewal or issuance of the physicians' licenses. Physicians who renewed before the effective date of the statute cannot be assessed until the triggering event (renewal of their licenses) occurs. When the triggering event occurs while the law is in place, the State has the right to collect the funds.

Under the triggering event analysis used in the Hanson line of cases, the State does not have the right to collect the surcharge from Plaintiff Class. The triggering event (license renewal) occurred before the effective date of the statute

(October 1, 1992). Therefore, Plaintiff Class is entitled to a refund of amounts paid under color of the surcharge.

III. TO APPLY THE STATUTE AS INTERPRETED BY THE LOWER COURTS CONSTITUTES A RETROACTIVE APPLICATION OF THE STATUTE NOT AUTHORIZED BY LAW.

A. Court of Appeals' Decision.

In addition to rejecting Plaintiff Class' argument that the statute, on its face, does not apply the surcharge to them, the Court of Appeals concludes that application of the surcharge to Plaintiff Class does not impair a vested right of these physicians in any way and therefore it follows the statute is not applied retroactively. The Court of Appeals states:

> If a physician from this group failed to pay the surcharge, that failure to pay would not affect the current license: the physician would be free to practice medicine in good standing until the next license renewal date. Failure to pay jeopardizes renewal of the license, but affects no current, vested right to practice medicine. Therefore, we conclude, as did the district court, that imposition of the surcharge to this group of physicians is not a retroactive application of the statute.

(A. 47)

The Court of Appeals concludes that since the penalty for failure to pay the $400 surcharge -- i.e. nonrenewal -- would not be assessed until the Plaintiff Class subsequently renew their licenses in 1993, the statute is not being applied retroactively. The Court of Appeals ignored the undisputed

fact that regardless of whether the Plaintiff Class ever subsequently renew their licenses, the surcharge of $400 is a debt that must be paid and it accrues interest. (A. 3-4)

Further, logically, no one ever has an obligation under a statute until the statute is in effect. Likewise, it follows that no penalty for noncompliance with the statute can be assessed until after the statute's effective date. The timing of the penalty for noncompliance cannot, therefore, determine retroactivity. If it were otherwise, retroactivity would be logically impossible. If the Legislature enacted, for example, a statute effective August 1994, imposing a surcharge on all attorney licenses issued in 1960, would that be "prospective" because those attorneys do not have an obligation to pay until after August 1994 and the penalty for nonpayment will not be assessed until after August 1994? The answer is no. Under the Court of Appeals' reasoning, the answer is "yes."

B. Under all Four Definitions of Retroactivity, This Statute was Applied Retroactively.

In Cooper v. Watson, 290 Minn. 362, 187 N.W.2d 689, 693 (1971), this Court set forth four definitions of what constitutes a retrospective application of a statute. In finding no retroactivity, the Court of Appeals did not follow Minnesota law. Under any definition of retroactivity used by this Court, § 147.01, subd. 6, was applied retroactively to Plaintiff Class.

1. **A retrospective law, in the legal sense, is one which takes or impairs vested rights acquired under existing laws, or creates a new obligation and imposes a new duty... in respect of transactions or considerations already past. Cooper, 187 N.W.2d at 693. (Emphasis in the original.)**

The surcharge is a condition of renewal of Plaintiff Class' licenses to practice medicine. It creates a new obligation and imposes a new duty to pay $400 with respect to the renewal of Plaintiff Class' licenses, which in all cases occurred before the effective date of the statute. When the Plaintiff Class licenses were issued or renewed, there was no obligation or duty to pay the surcharge. In fact, the Respondents had no legal right to impose such a surcharge when Plaintiff Class' licenses were issued or renewed in 1992. After October 1, the law changed and the lower courts have now held that the fact of Plaintiff Class' earlier renewal obligates the Class to pay a $400 surcharge. Any member of Plaintiff Class who refused to pay the surcharge exposed himself to multiple consequences. These include loss of his license through nonrenewal, interest charges and entry of judgment against the physician for the $400 surcharge. The surcharge is unquestionably a new obligation added to a past transaction. This constitutes a retroactive application of the 1992 statute.

The Court of Appeals concluded that the operation of this statute is not being applied retroactively because it only affects future renewals because refusal to pay the surcharge when charged only precludes a future renewal of a medical license, not the past renewal. The flaw in this logic is that it fails to note that regardless of whether the Plaintiff Class subsequently renews its licenses, that surcharge of $400 is a debt accruing interest. So even if a member of Plaintiff Class never renews his license again. he has an obligation to pay that $400 surcharge, plus the accrued interest.

The statute, as now interpreted by the lower courts, imposes an obligation on Plaintiff Class to pay an $800 surcharge for their first license renewal after the October 1 enactment of the surcharge law while everyone else pays $400. To so interpret the statute leads to the additional problem of

unconstitutionality based on equal protection grounds. This will be discussed in more detail later.

> **2. [Retroactivity] may also be deemed as one which changes or injuriously affects a present right by going behind it and giving efficacy to anterior circumstances to defeat it, which they had not when the right accrued. Cooper, 187 N.W.2d at 693.**

As of October 1, 1992, Plaintiff Class had the present right to practice medicine for the term of their license renewals. After that time, the Respondents applied a $400 surcharge to the prior renewal. This liability "cannot be erased." Failure to pay the $400 surcharge operates to defeat Plaintiff Class' eligibility to practice medicine forever in Minnesota even though the Plaintiff Class met all eligibility criteria when their licenses were issued or renewed in 1992. Therefore, the second definition of a retrospective law is also satisfied.

> **3. [A statute] which relates back to and gives to a previous transaction some different legal effect from that which it had under the law when it occurred. Cooper, 187 N.W.2d at 693.**

Retroactive application of the surcharge relates back to the previous transaction (renewal of a license) and gives it a different legal effect from that which it had under the law when it occurred. After the license renewal took place, the statute became effective which obligated each of Plaintiff Class to pay $400 as a result of that renewal. When the license was renewed, there was no obligation to pay an additional $400 and the renewal was valid without such payment. However,

the lower courts' interpretation of the statute changes that effect and renders the license invalid, by nonrenewal, unless the $400 surcharge is paid.

In the future, physicians can and will make the decision to renew their licenses with knowledge of the surcharge. Most, but not all, of them will pay the surcharge and renew the license. Physicians in Plaintiff Class did not have the opportunity to make that choice. By retroactively applying the statute, Respondents altered the legal effect of Plaintiff Class' prior license renewals, adding a payment of $400 as a condition of that renewal.

> **4. Another definition of a retrospective law is one intended to affect transactions which occurred, or rights which accrued, before it became operative and which ascribes to them effects not inherent in their nature, in view of the law in force at the time of their occurrence. Cooper, 187 N.W.2d at 693.**

Plaintiff Class renewed their licenses, accruing all rights thereunder, before the statute became operative. Applying the statute to these physicians ascribes to their prior renewal an obligation to pay the $400 surcharge. Paying a surcharge is not inherent in the license of the physician to practice medicine. The law in force at the time of the renewal did not require a $400 surcharge. This is a retroactive application of the statute.

Under any of the four Cooper tests, applying a surcharge to Plaintiff Class constitutes a retroactive application of the statute.

C. No Clear and Manifest Intent by the Legislature to Apply Retroactively.

Retroactivity is not favored in the law. In this State, no statute is to be construed to be applied retroactively unless "clearly and manifestly so intended by the Legislature." Minn. Stat. § 645.21. The courts will presume that a statutory enactment applies to the future and not to the past. Cooper v. Watson, 290 Minn. 362, 187 N.W.2d 689, 693 (1971). New burdens "ought always be prospective" and it is "reasonable to suppose that the Legislature has intended that they should be." State v. Crete Mining Co., 164 Minn. 273, 204 N.W. 932 (1925).

In following that legislative mandate, this Court has held that before a statute will be afforded retroactive application, there must exist clear and manifest evidence that the Legislature intended retroactive application. Duluth Firemen's Relief Ass'n v. Duluth, 361 N.W.2d 381, 388 (Minn. 1985). This Court has stated:

> It is thoroughly settled that a statute will not be given a retroactive operation unless it appears "by express command or by necessary and unavoidable implication" that such was the legislative intent. And, where a statute affects rights and liabilities, it will not be construed as affecting those previously existing, unless such construction is essential to give it effect, or its terms are so explicit as to preclude any other interpretation.

State v. Crete Mining Co., 164 Minn. 273, 204 N.W. at 932 (1925), quoting Builders' Limited Mut. Liab. Ins. Co. v. Compensation Ins. Board, 151 Minn. 427, 186 N.W. 860 (1922). There is a "uniformly accepted rule against giving to statutes a retroactive operation whereby rights previously

vested are injuriously affected unless compelled to do so by language so clear and positive as to leave no room to doubt that was the intention of the Legislature." Landgraff v. U.S. Film Products, __ U.S. __, 114 S.Ct. 1483, 1497 (1994). The United States Supreme Court recently noted that:

> The presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals shall have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations shall not be lightly disrupted.

Id.

Prospectivity remains the "default rule" in part because it accords with the public's widely held intentions about how statutes ordinarily operate. Landgraff, 114 S.Ct. at 1500. When the Legislature provides a specific effective date for the statute, "this is a clear manifestation the Legislature intended the statute to apply from that date forward." Baertsch, 518 N.W.2d at 23. The United States Supreme Court has declared that "a statement that a statute will become effective on a certain date does not even arguably suggest that it has any application of conduct that occurred on an earlier date." Landgraff, 114 S.Ct. at 1492. The Court of Appeals in reaching its conclusion on retroactivity held exactly to the contrary stating:

> Inasmuch as the vast majority of Minnesota legislation is effective August I of each year, the selection of October 1 as the effective date for this statute is significant. ... The October 1 effective date immediately follows the end of the licensing period

> for those in the first group. This structure indicates the Legislature clearly intended the statute to apply to those physicians who had renewed or been issued their licenses as of October 1, 1992. Therefore, such application is valid because the Legislature clearly and manifestly intended it.

(A. 47)

As the United States Supreme Court recognized when rejecting a similar analysis in Landgraff, to adopt the Court of Appeals analysis would require us to assume that Legislature chose a surprisingly indirect route to convey an important and easily expressed message concerning its intent to retroactively apply this statute.[5] Landgraff, 114 S.Ct. at 1495.

The statute's effective date coupled with the billing cycles does not clearly and manifestly express legislative intent to apply the statute retroactively. The Court of Appeals' conclusion that Plaintiff Class is identified in the first subdivision of § 147.01, subd. 6, is not true. (A. 47) As previously stated, the dates "April 1 and September 30, 1992" are not in the statute. "October 1, 1992" is only mentioned as the effective date of the statute. The Plaintiff Class consists of physicians who renewed their licenses between April 1 and September 30, 1992 or who were initially licensed in that period. As previously stated, only some of these Class members will incidentally fall into the group of physicians who renew in subsequent years between April 1 and September 30. Some will fall into the other billing group because their birth dates determine the renewal cycle. The billing cycles set forth in the statute are not specific to 1992 or any other year. It is precisely the absence of any language manifesting intent to

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[5] The statute shows no retroactive "intent" by the Legislature, let alone "clear and manifest intent."

impose retroactive surcharge liability on renewals before the effective date that underscores the futility of the Court of Appeals' decision.

The bottom line is that the 1992 statute does not clearly and manifestly evidence intent to be applied retroactively. No language in Minn. Stat. § 147.01, subd. 6, even hints at retroactive intent, let alone clearly manifests it. Because Respondents improperly retroactively applied the 1992 statute, Plaintiff Class is entitled to refund of the amounts paid thereunder.

IV. THE 1993 LEGISLATURE BY ITS AMENDMENT TO MINN. STAT. § 147.01, SUBD. 6, CANNOT DETERMINE THE INTENT OF THE 1992 STATUTE ENACTED BY THE 1991 LEGISLATURE.

The Minnesota Court of Appeals in deciding this case did not address the 1993 amendment to Minn. Stat. § 147.01, subd. 6. The trial court did utilize the amendment to support its interpretation of the 1992 statute.

As previously stated, while the summary judgment motions in this case were pending, Minn. Stat. § 147.01, subd. 6, was amended on May 27, 1993. Section 6 of the amendment seeks to apply the 1992 surcharge to members of Plaintiff Class. (A. 9) Section 129 states that Section 6 is intended to "clarify the original intent of the statute amended." (A. 11) Section 135, subd. 7, of the Act seeks to legislate the outcome of this lawsuit by applying the 1993 amendment to "pending cases" even though the surcharge is unrelated to the civil justice system. (A. 12) "Pending cases" is a euphemism for the instant case, which is the only lawsuit pending regarding the 1992 surcharge. It is neither an especially cynical nor sophisticated observation that the 1993 Legislature, aware that Respondents' arguments to charge

Plaintiff Class under the 1992 statute were insubstantial, was attempting to win this lawsuit for the Respondents.

This Court must therefore decide the legal effect of the 1993 legislative action. If the statute changes the law, then the 1993 statute is the focus of this case. If it did not change the law but merely, as it purports to do, states the 1993 Legislature's interpretation of the 1991 legislative intent, then the Legislature has performed a judicial function, and the amendment is void and of no effect. The Court's focus must then be on the 1992 statute.

A. Did the 1993 Amendment Change the Law?

An amendment presumptively changes the amended statute. Krumm v. R. A. Nadeau Co., 276 N.W.2d 641, 644 (Minn. 1979). This presumption is not available, however, when the language of an amendment states that it is intended merely to "clarify" the original statute. State by Spannaus v. Coin Wholesalers, Inc., 311 Minn. 346, 250 N.W.2d 583. 587-588 (1976). The 1993 amendment purports to be a clarifying statute. Therefore, Plaintiff Class may not avail itself of a presumption that the 1993 amendment was intended to change the 1992 statute. However, as this Court has recognized, the Legislature's mere pronouncement of an intention to "clarify" does not establish the converse -- no change. Honeywell, Inc. v. Minnesota Life and Health Ins. Guar. Ass'n, 518 N.W.2d 557, 562 (Minn. 1994). In determining whether an amendment substantively modifies prior law, this Court is not bound by the Legislature's "clarifying" statement but analyzes the intent and purpose of the original statute. The 1993 Legislature is not the interpreter of laws enacted by the 1991 Legislature. Id.

A simple reading of the 1992 statute and the 1993 version reveals a change was made. The 1992 statute did not impose a surcharge on licenses issued or renewed before October 1,

1992. The amendment in 1993 specifically states that it does impose this charge.[6] The 1993 statute is specific to Plaintiff Class.

It is especially revealing to note in this regard that the Legislature in 1993 passed a companion statute to the surcharge statute requiring notice in advance of the imposition of surcharges on professional licenses but did not grant the Plaintiff Class the benefit of such a notice requirement. The Legislature's action reveals its awareness that the 1992 surcharge enactment in April 1992 with an effective date of October 1, 1992 did not give notice to the Plaintiff Class of the imposition of the surcharge. In other words, the Legislature acknowledges that no reasonable person reading the 1992 enactment in April 1992 would have been on notice that the $400 surcharge was being imposed on licenses issued or renewed between April 1 and September 30, 1992.[7]

If the 1993 Legislature believed that the 1992 statute could fairly be read to have provided that notice, it had no need to single out Plaintiff Class and deny them the benefit of advance notice otherwise conferred on every other person in Minnesota who either renews or is issued a medical license after enactment of the 1993 amendment.

Ironically, the 1993 amendment, which Respondents have argued merely "clarifies" the 1992 statute, does not support Respondents' or the Court of Appeals' interpretation of the 1992 statute. The statute, as amended, does not state that the surcharge applies to all physicians currently licensed on October 1, 1992. It states it applies only to physicians licensed "as of or after" October 1, 1992 and whose licenses are issued or renewed after April 1, 1992. What is clear from the "amendment" is that the 1993 Legislature is offering yet

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[6] The 1993 statute might be taken as an example of the expression of that "clear and manifest intention" absent from the statute as enacted.

[7] In fact, the 1992 enactment was not enacted until April 29, 1992.

another construction of what was meant by the 1991 Legislature. It is interesting to note that the 1993 Legislature and the Court of Appeals differ.

Further, Plaintiff Class' analysis that the statute provides that the triggering event for the surcharge is the physician's license renewal or issuance is supported by the added notice provision. The notice provision provides that upon application or notice of license renewal the Board must provide notice to the applicant and to the person whose license is scheduled to be issued or renewed of any additional fees, surcharge or other costs which the person is obligated to pay as a condition of licensure. (A. 10) Clearly, the Legislature understood the triggering event for application of the surcharge was license issuance or renewal, not status on October 1, 1992. What is clear from the "amendment" is that the statute was never meant to apply to all physicians currently licensed on October 1, 1992.

If the Court concludes that the 1993 amendment is in fact a change in the law, then the Court must focus on the application of the 1993 statute to Plaintiff Class. If the Court concludes, as Respondents have continually argued, that the 1993 statute did not "change" the law, then a very serious constitutional issue confronts this Court. Such an enactment, if it does not change the law, violates Article III of the Minnesota Constitution and is void and without effect.

B. Is the 1993 Amendment Unconstitutional?

Article III of the Minnesota Constitution prohibits the respective branches of government from exercising "any of the powers properly belonging to either of the others except in the instances specifically provided in this Constitution." Minnesota Constitution Article III, section 1. When the Legislature "exercises powers not properly belonging to the legislative, but to the judicial department of the government, then the act

is in contravention of the Constitution and void." Sanborn v. Commissioners of Rice County, 9 Minn. 273 (Gil.) 258, 262-63 (1864); see Metropolitan Sports Facilities Comm. v. General Mills, Inc., 470 N.W.2d 118, 124-5 (Minn. 1991).

As this Court has recently stated, statutory construction is a judicial, not a legislative, function. Honeywell, 518 N.W.2d at 562. Under the separation of powers doctrine, the legislative branch has the power to enact the law, while the power to interpret the law is reserved for the judicial branch. In Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803), the United States Supreme Court stated, "it is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule." Id. While the legislative branch has the power to change the law, it does not have the power to usurp the powers delegated to other branches. Mistretta v. United States, 488 U.S. 361, 382 (1989).

Simply stated, the Legislature "has no power to direct the judiciary in the interpretation of existing statutes." 16 Am. Jur. 2d § 331 Constitutional Law, p. 870; see, e.g., Honeywell, 518 N.W.2d at 562; Roosevelt Raceway, Inc. v. Monaghan, 174 N.E.2d 71 (N.Y. 1961), motion denied, 176 N.E.2d 502 (N.Y. 1961), app. dismissed, 368 U.S.12 (1961); California Employment Stabilization Com. v. Chichester Transp. Co., 172 P.2d 100, 101 (Cal. App. 1946); Johnson v. Morris, 557 P.2d 1299, 1303 (Wash. 1976). The Legislature has no power to declare retroactively that an existing statute will be given a certain construction when such a construction is contrary to that which the statute would ordinarily receive. See Monaghan, 174 N.E.2d at 75; Levy v. Industrial Fin. Corp., 276 U.S. 281, 284 (1928).

This Court has held that the opinion of a subsequent Legislature upon the meaning of a statute is entitled to no more weight than that of the same person in a private capacity.

Bingham v. Supervisors of Winona County, 8 Minn. R. 441, 8 Minn. (Gil) 390 (1863). This Court has noted that while it desires to work in harmony with the legislative and executive branches of government, it "cannot and should not abdicate [its] judicial responsibility by failing to assert [its] inherent right to perform a function which is clearly judicial, however unpleasant it may be to assert that right." Sharood v. Hatfield, 296 Minn. 416, 210 N.W.2d 275, 280 (1973).

The Ninth Circuit in Seattle Audobon Society v. Robertson, 914 F.2d 1311, 1315 (9th Cir. 1990), rev. on other grounds, __U.S.__, 1 12 S. Ct. 1407 (1992), succinctly summarized the principle governing the distinction between constitutionally permissible and constitutionally impermissible legislative action with regard to pending litigation:

> The critical distinction, for purposes of deciding the limits of Congress authority to affect pending litigation through statute, is between actual repeal or amendment of the law underlying the litigation, which is permissible, and the actual direction of a particular decision in a case without repealing or amending the law underlying the litigation, which is not permissible.

Thus, the Legislature can amend or repeal any law but it "cannot prescribe a rule of decision where no new circumstances have been created by legislation." See, e.g., United States v. Mein, 80 U.S. (13 Wall) 128 (1872) (Congress does not have the power to prescribe rules of decision for cases pending before the judicial branch).

The fundamental power to construe the statute at issue here belongs only to this Court. In contravention of the Constitution, the 1993 Legislature enacted into law its own interpretation of the 1992 statute by which it seeks to govern this Court. The purpose of the 1993 amendment was to construe the statute and "clarify the original intent of the

statute amended," as the 1993 Legislature understood the 1991 Legislature's intent. This statutory construction is beyond the Legislature's power and is an exercise of power properly belonging only to the judicial branch. It is this Court's duty to find the Legislature's 1993 actions to be an impermissible constitutional invasion by the legislative branch into functions that are judicial. Therefore, the statute is null and void. See Sharood, 210 N.W.2d at 282.

What if the 1993 Legislature had enacted the following statute: "In the case of Ubel v. State of Minnesota, Minn. Stat. § 147.01, subd. 6, (1992) shall be interpreted by the courts of this State as imposing the surcharge on those physicians whose licenses were issued or renewed between April 1 and September 30, 1992." Is there any doubt that the enactment of that statute constitutes a constitutionally impermissible exercise of a judicial function by the Legislature? What the Legislature did in 1993 is not materially different. In 1993 the Legislature did nothing more than tell the judiciary how to interpret the 1992 version of the statute with respect to all "pending cases." This case is the pending case! The Legislature was performing a judicial, not a legislative, function and its enactment is void.

One cannot overemphasize the importance of this issue to all residents of the State of Minnesota. If the Minnesota Legislature has the authority to declare -- i.e. interpret -- what the intent was of a prior Legislature, then the judiciary of this State is no longer the sole interpreter of Minnesota laws. Controversies between the parties over statutory interpretation will be decided by the Legislature, not the courts. The party with the strongest lobby in the Minnesota Legislature will simply ask the Legislature to "adjudicate" the issue between the parties.

V. RETROACTIVE APPLICATION OF THE 1993 STATUTE OR THE 1992 STATUTE TO PLAINTIFF CLASS IS UNCONSTITUIONAL.

As previously set forth, the 1992 statute does not apply and cannot authorize Respondents' actions. If the Court concludes the 1993 statute amended the law and is therefore not void as an unconstitutional attempt to wield judicial power, then this Court must analyze this case and that statute under the due process and equal protection guarantees of the Minnesota and United States Constitutions. This same due process and equal protection analysis applies if this Court should conclude the 1992 version is applicable and may be retroactively applied.

A. The 1993 Amendment and the 1992 Version if Applied Retroactively Violate Principles of Due Process and Constitutionally Impair Plaintiff Class' Protected Property Rights.

The 1993 amendment and the 1992 version (if deemed to apply retroactively) violate due process guarantees contained in the United States and Minnesota Constitutions.

Statutes are presumed to be constitutional. Minn. Stat. § 645.17(3); Guilliams v. Comm'r of Revenue, 299 N.W.2d 138, 142 (Minn. 1980). The party challenging the constitutionality of a statute must demonstrate beyond a reasonable doubt that it is unconstitutional. John Hancock Mut. Life Ins. Co. v. Commissioner of Revenue, 497 N.W.2d 250, 253 (Minn. 1992). The United States Constitution's Fourteenth Amendment and Article I, Section 7, of the Minnesota Constitution both prohibit the State from depriving any person of life, liberty or property without due process of law. The due process protection provided under both Constitutions is

identical. Sartori v. Harnischfeger Corp., 432 N.W.2d 448, 453 (Minn. 1988).

The elusive concept of a property interest has been routinely explained in these terms:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

Cable Communications Board v. Nor-West Cable Communications Partnership, 356 N.W.2d 658, 666 (Minn. 1984), quoting Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Flushing out this approach, this Court has noted: "[A] protected property interest is created when the governing state law gives an individual 'entitlement' that is only removable for cause." Schocker v. State Dep't of Human Rights, 477 N.W.2d 767, 770 (Minn. Ct. App. 1991), rev. denied, citing Memphis Light, Gas & Water Div. v. Kraft, 436 U.S. 1, 11-12 (1978). "A vested right ... means some right which has been fixed or established." Olsen v. Special School Dist. No. 1, 427 N.W.2d 707, 711 (Minn. Ct. App. 1988).[8]

1. Plaintiff Class has protected property interests.

The Court of Appeals, while acknowledging that Plaintiff Class asserts that application of § 147.01, subd. 6, to them

[8] The phrase "vested right" is not found in the Constitution. Commentators in the courts have recognized that focusing on the concept of "vested rights" does nothing more than state due process conclusions and is unnecessarily confusing. Rather, the focus should be on due process. Pacific Mut. Life Ins. Co. v. First Republic Bank Corp., 997 F.2d 39, 46-47 (5th Cir. 1993), reh'g denied, and treaties cited therein.

violates constitutional guarantees of due process, states, without explanation or citation to any authority that "legislative process itself constitutes due process." (A. 47) The Court of Appeals then concludes "physicians have not shown how the Legislature's passage of the statute violated their due process rights."[9] (A. 47) One of the purposes of the due process clause is to protect a citizen's interests in fair notice and repose that is compromised by retroactive legislation. Landgraff, 114 at 1497. As the United States Supreme Court has recognized, retroactive statutes are of particular concern because the Legislature's "unmatched powers allow it to sweep away settled expectations suddenly" and "its responsivity to political pressures poses a risk" that it will use that power as a means of "retribution against unpopular groups." Id. Clearly, in the context here, the legislative process itself cannot possibly constitute "due process." Further, the Court of Appeals ignored the fact that the surcharge was being retroactively imposed on those who had fully complied and had obtained their licenses for 1992. Having met the renewal requirements and having obtained the renewal, Plaintiff Class indeed had a vested right in their renewed licenses. See Barry v. Barchi, 443 U.S. 55, 63 (1979).

It is undisputed that practice of a profession is a property right protected by the Fourteenth Amendment. Barry v. Barchi, 443 U.S. at 63 (Barchi had a property right in his license sufficient to invoke protection of due process); In re Haukebo, 352 N.W.2d 752, 754 (Minn. 1984). In Minnesota, a property interest in a license or permit vests upon meeting the requirements necessary to obtain that license or permit. See Waste Recovery Co-op v. County of Hennepin, 504

[9] Obviously the Court of Appeals' decision on the constitutional issues raised is dicta in that the Court of Appeals had concluded that the 1992 statute was not being applied retroactively to Plaintiff Class.

N.W.2d 220, 227 (Minn. Ct. App. 1993), rev. on other grounds, 517 N.W.2d 329 (Minn. 1994) (WRC and PRI may have constitutionally protected property interest in the directories and licenses). When the State renewed or issued Plaintiff Class' medical licenses between April 1 and September 30, 1992, Plaintiff Class acquired a protected property interest for the term of that license.

Further, prior to the assessment of the surcharge, each Plaintiff had established a right to the $400 in their possession. This property interest is also constitutionally protected. See K.E. v. Hoffman, 452 N.W.2d 509, 512 (Minn. Ct. App. 1990), rev. denied.

Respondents have claimed that Plaintiff Class did not have a protected property right in their subsequent 1993 license renewals. That is not the issue before the Court. The question under consideration is whether Plaintiff Class had a protected property interest in their 1992 license renewals (and original issues), which were granted before the effective date of the 1992 statute. The 1992 renewals, once granted, are constitutionally protected. Before October 1, 1992, Plaintiff Class fulfilled all requirements of the renewal such that their medical licenses could only be removed for cause. The 1992 statute retroactively impaired their 1992 renewals by attaching an additional payment to them. This retroactive impairment is an unconstitutional taking of Plaintiff Class' protected property interest.

The issue could best be illustrated, perhaps, if the Legislature had provided that no defaulting member of the Plaintiff Class could ever be issued or renew, say, a driver's license. The argument that no one has a constitutional right to a driver's license misses the point. The deprivation of eligibility for the license is a new disability imposed as a penalty for not accepting the imposition of a new obligation on a past transaction. The impairment is aggravated, not

obviated, by the penalty of lost eligibility to receive a driver's license in the future.

Respondents' argument that it may deny future eligibility to enjoy the privileges of citizenship to citizens who decline to pay a surcharge on a present vested right cannot be seriously contended. Would it be the case, then, that the 1994 Legislature could surcharge the driver's licenses of everyone who renewed such a license in, say, 1990, and justify the surcharge by imposing as a penalty for nonpayment, future ineligibility to be licensed in Minnesota? Where the Legislature imposes a retroactive surcharge on the license fee, the penalty imposed would necessarily be the deprivation of a future entitlement. Taken to its necessary conclusion, the lower courts have concluded that since the penalty is imposed after the statute's effective date, retroactivity in this context can never be a constitutional problem. To the contrary, retroactivity here is a constitutional problem.

2. The 1993 amendment is unconstitutional because it retroactively impairs the protected property rights of Plaintiff Class.

a. Standard to be applied.

Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it deprives citizens of legitimate expectations and upsets settled transactions. The United States Supreme Court has observed:

> [R]etroactive statutes raise particular concerns. The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted

> to use retroactive legislation as a means of retribution against unpopular groups or individuals.

Landgraff, 114 S.Ct. at 1497. For this reason, "the retroactive aspects of [economic] legislation, ... must meet the test of due process: a legitimate legislative purpose furthered by rational means." Pension Ben. Guaranty Corp. v. R. A. Gray & Co., 467 U.S. 717, 730 (1984). The burden is on one complaining of a due process violation to establish that the Legislature has acted in an arbitrary and irrational way. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976).

The United States Supreme Court has recognized that retroactive legislation does have to meet a burden not faced by legislation that only has future effects. "It does not follow ... that what Congress can legislate prospectively it can legislate retrospectively. The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." Usery, 428 U.S. at 16-17 (1976), cited with approval in Landgraff, 114 S.Ct. at 1498, fn. 21. As previously stated, the due process clause "protects the interests in fair notice and repose that may be compromised by retroactive legislation." Landgraff, 114 S.Ct. at 1497. For example, most recently the United States Supreme Court, in United States v. Carlton, __U.S.__, 114 S.Ct. 2018 (1994), reaffirmed its past invalidation of retroactive taxes where the retroactive tax involved the imposition of a new tax rather than a change in tax rates. Id. at 2023. Here the surcharge imposed on Plaintiff Class was the equivalent of a new "tax." While Plaintiff Class had, in the past, paid a licensing fee those funds were used to regulate the practice of medicine. This surcharge, which had never been imposed before, is not measured by the cost of the regulation of the practice of medicine, but is deposited in the State's general fund and can be used for any State purpose.

Judicial review of economic legislation under the due process clause is limited to a determination as to whether the legislation represents a rational means to a legitimate end. Turner Elkhorn Mining Co., 428 U.S. at 18-19. The rationality of a retroactive legislative enactment is determined by a comparison of the problem to be remedied with the nature and scope of the burden imposed to remedy that problem. Nachman Corp. v. Pension Ben. Guaranty Corp., 592 F.2d 947, 960 (7th Cir. 1979), aff'd, 446 U.S. 359 (1980).

b. The Legislature has acted arbitrarily.

When one looks at the equities of imposing the retroactive surcharge on Plaintiff Class, it is clear that the Legislature has acted in an arbitrary and irrational way. Minnesota was raising money for its "general fund." The surcharge fees collected are designated for the general treasury of the State, not for the regulation of the profession of medicine. While raising money for the State's general fund may itself be a legitimate purpose, there is no competent explanation of why meeting this need may constitutionally be imposed selectively and retroactively on physicians born between April 1 and September 30 and physicians entering practice initially between April 1, 1992 and September 30, 1992. It is arbitrary and irrational to select roughly one-half of the State's physicians on the basis of birth date and initial license date to raise over $2 million for the State's general fund.

When the 1993 amendment was passed, physicians renewing or receiving a license since October 1, 1992, were already being surcharged. The 1993 amendment selected a group -- physicians -- and required them alone to pay a surcharge on licenses already issued or renewed. Then, within this class, it imposed a burden only on those whose licenses were issued or renewed between April 1 and September 30,

1992. No one has ever explained why the need to raise more money justified retroactively selecting this group of physicians alone to pay the tax. It appears simply that this group of physicians has the closest temporal relationship, in terms of licenses issued or renewed, to the October 1 effective date. It is clearly unfair and therefore arbitrary to force Plaintiff Class physicians to pay a surcharge in 1992 while allowing the remainder to avoid the surcharge. This allocation of the surcharge burden is purely arbitrary.[10]

In essence, the State is imposing a general tax on a small group allocated solely by reason of their profession and birth dates. If this is constitutional legislation, one supposes that the next time the State needs an extra $5 million or so, it will impose a tax of $300 on, say, bartenders born between March 1 and June 30. Further, if Respondents can assess $400 retroactively, what stops them from retroactively assessing $4,000 or $40,000? If the State's argument here has any weight, there is little to stop them.

Application of Minn. Stat. § 147.01 to Plaintiff Class interfered with the legally induced and settled expectation of Plaintiff Class that upon complying with the law in effect when they renewed their licenses in 1992, no further burden would be placed upon them based on that renewal. Notice is a relevant consideration in determining whether due process requirements are met. See United States v. Darusmont, 449 U.S. 292 (1981). See also Landgraff, 114 S.Ct. at 1497 (noting that the due process clause protects the interests in fair notice and repose that may be compromised by retroactive legislation.) The retroactive legislation does not satisfy due

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[10] It remains an open question whether taxing only physicians $400 per person at the time of license renewal to pay the State's general needs affords equal protection. Tax burdens must be apportioned on some rational basis. This argument, however, is beyond the scope of this appeal.

process requirements because Plaintiff Class had no notice of changing legal circumstances and had no opportunity to conform their conduct to the requirements of the new legislation. In the future physicians can and will make the decision to renew their licenses with knowledge of the surcharge. Physicians in Plaintiff Class did not have the opportunity to make that choice. The 1993 Legislature by enactment of the companion statute requiring a notice requirement has admitted that this Class had no advance notice that the license surcharge would be retroactively applied to it. It is unconscionable that the State could apply a charge without giving the licensee the opportunity to avoid, the charge by not renewing the license.

Furthermore, although physicians in the past had been exposed to a license fee, this new and more burdensome legislation is not even closely akin in type and scope to the prior licensing fee imposed. The license fee of $115 paid by Plaintiff Class was a function of the cost of regulating medical practice and was, in that sense, a true license fee. The $400 surcharge is simply a flat tax. It might as well have been imposed on professional football players. Minn. Stat. § 214.06, subd. 1; Minn. R. 5600.2500. To so impose this burden with no notice violates due process. See United States v. Carlton, __U.S.__, 114 S.Ct. 2018 (1994) (reaffirming the invalidation of retroactive tax which imposes a new tax rather than a change in tax rates).

B. The 1993 Amendment Violates Equal Protection Principles Because it Divides Physicians Into Two Arbitrary Classes, Which are not Rationally Related to a Legitimate State Interest.

Plaintiff Class asserts that the statute as initially enacted and as amended violates both the state equal protection clause, Minnesota Constitution Article I, Section 2, and the federal

process requirements because Plaintiff Class had no notice of changing legal circumstances and had no opportunity to conform their conduct to the requirements of the new legislation. In the future physicians can and will make the decision to renew their licenses with knowledge of the surcharge. Physicians in Plaintiff Class did not have the opportunity to make that choice. The 1993 Legislature by enactment of the companion statute requiring a notice requirement has admitted that this Class had no advance notice that the license surcharge would be retroactively applied to it. It is unconscionable that the State could apply a charge without giving the licensee the opportunity to avoid, the charge by not renewing the license.

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equal protection clause, U.S. Constitution Amendment XIV, Section 1.

1. Standard to be applied.

In State v. Russell, 477 N.W.2d 886, 888-89 (Minn. 1991), this Court articulated a rational basis test under the Minnesota Constitution which is different and more stringent than its federal counterpart. That test requires:

> (1) the distinctions which separate those included within the classification from those excluded must not be manifestly arbitrary or fanciful but must be genuine and substantial, thereby providing a natural and reasonable basis to justify legislation adapted to peculiar conditions and needs;
>
> (2) the classification must be genuine or relevant to the purpose of the law; that is there must be an evident connection between the distinctive needs peculiar to the class and the prescribed remedy; and
>
> (3) the purpose of the statute must be one that the State can legitimately attempt to achieve.

Id. at 888. Accordingly, this Court must apply a more stringent standard of review, as a matter of State law, under our State constitutional equivalent to the equal protection clause. State v. Russell, 477 N.W.2d at 889; see also Mitchell v. Steffen, 487 N.W.2d 896, 904 (Minn. Ct. App. 1992), aff'd 504 N.W.2d 198 (1993), cert. denied, __U.S.__, 114 S.Ct. 902 (1994); In the Matter of Welfare of K.C., 513 N.W.2d 18, 23 (Minn. Ct. App. 1994), rev. denied.

The equal protection clause of the Fourteenth Amendment commands that "no state shall deny to any person

within its jurisdiction the equal protection of the laws which is essentially a direction that all persons similarly situated should be treated alike." City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985). In order to satisfy equal protection requirements under the federal Constitution, all classes created by statute must be reasonably related to a legitimate State interest. Id. "The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." Id. at 446. Under either the federal standard of rational basis or the stricter state standard the legislation cannot stand.

2. **Statute violates equal protection guarantees.**

The 1993 amendment violates equal protection principles which guarantee that similar people will be dealt with in a similar manner. Class legislation is prohibited if it creates arbitrary classes which are not rationally related to a legitimate State interest. The 1993 amendment is unconstitutional because it creates such classes in violation of the equal protection clauses of the United States and Minnesota Constitutions.

In this case, of course, Minnesota was raising money for its "general fund." Minn. Stat. § 147.01, subd. 6. While raising money for the State's general fund is itself a legitimate purpose, no competent explanation of why meeting this need may constitutionally be imposed selectively and retroactively on physicians born between April 1 and September 30 and physicians entering practice initially between April 1, 1992 and September 30, 1992 has been offered. No rational basis for selection of this Class comes to mind or is itself suggested in the statute.

Here a retroactively selected subgroup of physicians has been assessed a $400 surcharge. The benefit of the funds raised from the small group, however, is distributed among all

example, if they retroactively provide different levels of benefits based on the dates citizens establish residence in the state. Zobel v. Williams, 457 U.S. 55 (1982) (statute denies equal protection when it provides disparate benefits based on length of residency); Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985) (a statute granting tax benefits to Vietnam War veterans based on the date of inception of state residency denies equal protection). In those cases, the United States Supreme Court made it clear that statutes retroactively creating fixed permanent distinctions are not constitutional. Other examples of statutory unconstitutionality on the rational basis test are those creating classes based on mental retardation (Cleburne, supra), foreign residency of business owners (Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985), reh'g denied, 471 U.S. 1120 (1985) and extended families (Village of Belle Terre v. Boraas, 416 U.S. 1 (1974)).

The Hooper and Zobel cases are most instructive here. These cases establish "when a statute distributes benefits unequally, the distinction it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment." Hooper, 472 U.S. at 618. "Zobel made clear that the Constitution will not tolerate a state benefit program that creates fixed, permanent distinctions ... between ... classes and of concededly bona fide residents, based on how long they have been in the State." Hooper, 472 U.S. at 623.

The Hooper case also held that "singling out previous residents for the tax exemption, rewards only those citizens for their 'past contributions' toward our Nation's military effort in Vietnam. Zobel teaches us that such an objective is 'not a legitimate state purpose.'" Hooper, 472 U.S. at 623. "The only apparent justification for the retrospective aspect of the program, 'favoring established residents over new residents,' is constitutionally unacceptable." Zobel, 457 U.S. at 65.

Although these cases deal specifically with conferring a selective benefit on the basis of retroactive criteria rather than

imposing a charge on such a basis as in the instant case, the distinction is not material for the purpose of analysis. If length of state residency is not rationally related to tax benefits conferred on a retroactively defined class, what can be said about a profession and birth date as a retroactive criteria for a selective tax to "enhance the financial integrity of the State?"

The constitutionally invalid distinctions discussed are less arbitrary than the two classes created by the 1993 amendment. Further, under the Minnesota Constitution, which analyzes such legislation much more stringently than its federal counterpart, there is no question that the statute fails for a lack of a genuine and substantial distinction between those inside and outside the class. State v. Russell, 477 N.W.2d at 889.

The transparent purpose of the 1993 amendment is to help Respondents win this lawsuit. Adjudicating the winner of the case is a judicial, not a legislative, function. Respondents have alluded to two other purposes for the 1993 amendment. The first is to raise money for the State's general fund and the second is to acquire additional matching funds from the federal government. The classes created by the 1993 amendment are not rationally related to either purpose. There is no characteristic of Minnesota physicians which makes it reasonable for them to carry the entire burden of replenishing the State's depleted coffers. Nor is there a rational basis to isolate physicians, out of all health care providers, to bear the burden required to obtain federal medical assistance benefits shared by the Minnesota health care industry.

When the 1993 amendment was passed, physicians renewing or receiving a license since October 1, 1992 were already being surcharged. The 1993 amendment selected a group -- physicians -- and required them alone to pay a surcharge on licenses already issued or renewed. Then, within this class, it imposed the burden only on those physicians whose licenses were issued or renewed between April 1 and September 30, 1992. Respondents argue that the purpose was

to raise a larger sum of money than would be raised by surcharging from October 1, 1992. Respondents do not explain why the retroactively determined need to raise more money justified retrospectively selecting this group of physicians alone to fund this need. It appears simply that this group of physicians is the closest temporal relationship, in terms of licenses issued or renewed, to the October 1 effective date. This allocation of the surcharge burden is purely arbitrary. The funds in question are designated for the general treasury of the State, not for the regulation of the profession of medicine.

Under Section 1903 of the Social Security Act (42 U.S.C. § 1396b, et. seq.), Minnesota may obtain matching funds from the United States government pursuant to a formula based on the amount of money the State spends for medical assistance. In order to receive these funds, the dollars must be raised in Minnesota uniformly within classes of health care providers. 42 U.S.C. § 1396b(w)(3)(B) and (3)(C). These classes of providers are: inpatient hospitals, outpatient hospitals, nursing care facilities, mentally retarded care facilities, physicians, home. health care services, prescription drugs and HMO's. 42 U.S.C. § 1396b(7).

These classes of health care providers are similarly situated relative to the State's ability to raise matching funds. By assessing the surcharge on any of these classes, the State would raise the matching funds exactly as well as by surcharging physicians. Physicians are treated differently by the 1993 amendment, which retroactively assesses a surcharge only on a subclass of one of the provider classes, physicians. In order to survive equal protection scrutiny, Respondents must show that isolating a select group of physicians to contribute the funds to be matched is rationally related to obtaining the matching funds.

The Court of Appeals, while stating that the purpose of the surcharge is to attract federal matching funds, would not

acknowledge the equal protection violation. (A. 47) Isolating the physicians does not enable the State to obtain matching funds. In fact, it militates against that purpose because it is not "broad based and uniform" within the physician class. Also, the federal law has no basis for the retroactive selection of physicians alone to bear a shortfall in funds raised from all health care providers. There is no reason demonstrated to isolate the physicians to retroactively contribute the matching funds. Rewarding the other classes for past contributions, by not imposing the surcharge, is not a legitimate State purpose. Hooper, 472 U.S. at 622, citing Zobel, 457 U.S. at 63.

The 1993 amendment creates arbitrary classes which are not rationally related to a legitimate State interest and thus does not survive scrutiny under the rational basis test. It is void as unconstitutional violative of the equal protection principles.

Finally, under the lower courts' interpretation of the statutes, Plaintiff Class is required to pay $800 when they renew their licenses for the first time after the effective date of the statute -- $400 on October 1, 1992 and $400 again when they renew in April through September 1993 -- while those who renewed after October 1, 1992 only pay $400. This raises an additional equal protection argument. On what possible basis can one group of physicians be obligated to pay $400 more than any other group of physicians similarly situated? No possible support can exist for the creation of a surcharge that adversely affects one group of physicians over another. There is no question that the statute is based on an "arbitrary rather than a genuine and substantial distinction." State v. Russell, 477 N.W.2d at 890. It violates equal protection guarantees.

CONCLUSION

If the Court concludes that only the 1992 version of § 147.01, subd. 6, applies, the judgment must be reversed and judgment ordered entered in favor of Plaintiff Class in that the statute did not authorize Respondents to collect the surcharge from Plaintiff Class. If the Court concludes the 1992 version retroactively so authorized, the judgment must be reversed in that the enactment violates the due process and/or equal protection clauses of the U.S. and Minnesota Constitutions.

If this Court concludes that the 1993 version applies, the judgment must also be reversed in that it violates the Minnesota and U.S. Constitutions.

Dated: October 17, 1994

LOMMEN, NELSON, COLE &
STAGEBERG, P.A.

BY s/s _____

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C7-94-300

STATE OF MINNESOTA
IN SUPREME COURT

Dr. Frank A. Ubel, M.D.,
and Dr. Howard Andersen, M.D.,
each individually and as members
of a class of persons similarly situated,

Petitioners,

v.

State of Minnesota,
Minnesota Board of Medical Practice and
Minnesota Department of Human Services,

Respondents.

PETITION FOR REHEARING AND APPENDIX

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PETITION FOR REHEARING

Appellants/Petitioners Dr. Frank A. Ubel, M.D., and Dr. Howard Andersen, M.D., each individually and as members of a class of persons similarly situated (hereinafter referred to as the Plaintiff Class) respectfully request that the Court grant rehearing pursuant to Minn. R. Civ. App. P. 140 on the following grounds:

- The Court has misconceived that its opinion is one of affirmance when, in fact, it is one of reversal and therefore its mandate to the district court is in error. This case should be reversed and remanded.

- The Court has failed to consider that the liability and therefore the "results" under the 1992 version of Minn. Stat. § 147.01, subd. 6, are different than the liability and therefore the "result" under the 1993 version of Minn. Stat. § 147.01, subd. 6.

- Since the "results" under the 1992 statute are not and cannot be the same as the "results" under the 1993 statute, the minority concurring Justices (J. Tomljanovich and J. Stringer), by their determination that the 1992 statute would impose liability on the Plaintiff Class, could not possibly concur in the result reached by Justice Coyne and Chief Justice Keith who rejected liability under the 1992 statute but would impose liability under the 1993 statute.

- The Court has erroneously constructed its "majority" opinion by combining opposing minority opinions on the source of the judgment

and the theory of liability and by this device has inadvertently suppressed the publication of the true mandate of the Court, i.e. reversal. The minority concurring opinion (J. Tomljanovich and J. Stringer) is not a concurring opinion but actually dissents from the majority opinion of Justice Coyne and Chief Justice Keith, as well as from the dissent of Justices Page, Gardebring and Anderson, all five of whom joined in holding that the 1992 statute did not assess the surcharge on the Plaintiff Class collected from them in December 1992. As it now stands, two Justices would impose liability under the 1993 statute (J. Coyne and C.J. Keith), two under the 1992 statute (J. Tomljanovich and J. Stringer), five Justices have ruled the 1992 statute imposes no liability at all (J. Coyne, C.J. Keith, J. Page, J. Gardebring and J. Anderson), three have found the 1993 statute unconstitutional (J. Page, J. Gardebring and J. Anderson), and two (J. Tomljanovich and J. Stringer) have abstained from any ruling whatsoever on the imposition of judgment under the 1993 statute. The majority of the Court, therefore, has ruled no liability under the 1992 statute, and the plurality of the Court has ruled no liability under the 1993 statute. There is neither a majority nor a plurality of the Court in favor of imposing an identical liability on the Plaintiff Class.

- The retroactive imposition of a wholly new tax has never been sanctioned by the United States Supreme Court which appears to have recognized that although a legislature may indeed have a legitimate or benign purpose in seeking to so

impose, it is nonetheless arbitrary and therefore a violation of due process to impose a wholly new tax on transactions which were made and complete before the enactment of the wholly new taxing statute.

- The Court has failed to address the Plaintiff Class' constitutional challenge to the 1993 statute on the grounds of equal protection, i.e., may the Legislature lawfully select approximately half of the State's licensed physicians by the accident of their birth date to pay a retroactive new tax not otherwise imposed on the other half of the state's physicians or upon any other citizen in the State?

ARGUMENT IN SUPPORT OF PETITION

I. THE COURT HAS ERRONEOUSLY CORRELATED THE LIABILITY OF THE PLAINTIFF CLASS UNDER THE TWO DISTINCT STATUTES AND HAS ISSUED AN ERRONEOUS MANDATE.

The Plaintiff Class consists of all physicians whose licenses to practice medicine in Minnesota were issued or renewed between April 1, 1992 and September 30, 1992 and who were assessed and paid the surcharge under Minn. Stat. § 147.01, subd. 6, effective October 1, 1992. (A. 19.) Respondents State of Minnesota, Minnesota Board of Medical Practice and Minnesota Department of Human Services (hereinafter collectively referred to as the State) have always taken the position that Minn. Stat. § 147.01, subd. 6 (1992) (hereinafter referred to as the 1992 Statute) by its terms authorized such a surcharge on the Plaintiff Class. The State argued that the Legislature's amendment in 1993, effective

May 28, 1993, that "the surcharge applies to a physician who is licensed as of or after the effective date of this section in Laws 1992 [October 1, 1992], and whose license is issued or renewed on or after April 1, 1992" (hereinafter referred to as the 1993 Statute), was a mere "clarification" supporting the construction that the 1992 Statute charged the Plaintiff Class with the $400 surcharge. (Respondent State's Brief to Supreme Court, pp. 15-17, A. 46-48.)

The suit was initiated in this case by the Plaintiff Class to recover the $400 wrongfully assessed them and collected in December 1992 under the 1992 Statute. (A. 37.) The Plaintiff Class has never been assessed the 1993 retroactive new tax at any time and, accordingly, has never paid it.[1] (A. 37, 43.) While the case was pending on the 1992 Statute, the 1993 retroactive new tax was passed ostensibly to instruct the district court on the correct interpretation of the 1992 Statute. This ostensible function of the 1993 Statute, i.e., "clarifying" the 1992 Statute, appears to have been rejected by all members of the Court writing on the subject. If the 1993 new tax law imposes a retroactive tax liability as postulated in the opinion of Justice Coyne, it was not due to be paid by the Plaintiff Class under the terms of the 1993 Statute until December 1993. The Plaintiff Class' liability for this new tax was, at the time of the district court action and at the time of the district court's order for judgment (November 29, 1993), a matter of declaratory judgment only. (A. 21.) If the district court and the Court of Appeals had made the same conclusion

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[1] Unlike the view offered in the opinion of the Court that the 1993 Statute imposes a new retroactive tax, the State has argued, without wavering, that the 1993 Statute only clarified and legitimized their 1992 surcharge assessment. To this Court the State emphatically argued that the "scope of the physician license surcharge has not been changed or expanded by the [1993] amendments." (Respondent's Brief, p. 21; see also pp. 15-17, A. 46-50, 52.) The State has never had the occasion to assess the Plaintiff Class with the 1993 tax. (A. 43-44.)

as set forth in the opinion of Justice Coyne, judgment in favor of the Plaintiff Class on the Complaint would have been ordered with a proviso in the declaratory judgment that those members of the Plaintiff Class who continued to hold their licenses on October 1, 1992 were liable to pay the retroactive tax when it came due on December 15, 1993. To the extent that the State and the Plaintiff Class may have agreed to offset these judgments, the Plaintiff Class would have been entitled to one year's interest (approximately $100,000).[2] Also, those members of the Plaintiff Class who did not hold their licenses as of October 1, 1992, would have been entitled to a complete refund plus interest.[3]

II. THE COURT HAS NOT CORRECTLY COUNTED ITS MAJORITY AND PLURALITY OPINIONS.

A. The Majority of the Court Has Awarded the Plaintiff Class Reversal on the 1992 Statute, and a Plurality Has Awarded Them Declaratory Judgment on the 1993 Retroactive Tax.

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[2] This obviously practical resolution may have been one that the parties may have considered. Nonetheless it was not a result that could have been ordered in this case on November 29, 1993 since the tax was not due until December 15, 1993. The Supreme Court has in effect rendered a judgment that never could have been rendered in either the district court or the Court of Appeals.

[3] The proviso that the $400 tax liability would fall only upon those members of the Plaintiff Class who continued to hold their license on October 1, 1992 was not contained in the 1992 Statute. (A. 3.) The State has asserted it only sent out invoices in 1992 to those physicians who held active licenses on October 1, 1992. If that was not the case, members of the Plaintiff Class who paid but did not hold an active license on October 1, 1992 are entitled to a refund.

The assumption inherent in the opinion issued by the Court that it is affirming the judgment of the district court and Court of Appeals is erroneous. Only Justices Tomljanovich and Stringer would affirm the district court, albeit with modifications. (The concurring two Justices would not require the physician to be holding the license on October 1, 1992 as the trial court required, because the minority, unlike the district court, imposes the 1992 surcharge without reading into it the engrossments from the 1993 Statute.)

The trial court held that the 1992 Statute, when read in conjunction with the "clarifying" 1993 amendment[4], provided that the Plaintiff Class is liable under the 1992 Statute for the surcharge previously billed and collected by the State if the physician was holding the license on October 1, 1992. (A. 17.) The Court of Appeals affirmed the lower court, concluding that the 1992 Statute, by its terms, authorized the collection of the surcharge on the Plaintiff Class. The Court of Appeals did not address the 1993 Statute. (A. 35.)

This Court reversed the district court with five members in concurrence (J. Coyne, C.J. Keith, J. Page, J. Gardebring and J. Anderson), but two justices (J. Coyne and C.J. Keith) ruled that the 1993 Statute as a stand-alone retroactive new tax enacted for the first time without any antecedent in May 1993 would justify imposing a $400 retroactive tax on those members of the Plaintiff Class holding their license on October 1, 1992. (A. 1.) This Court was therefore the first court to conclude that the 1992 Statute did not impose a license surcharge on physicians whose licenses to practice medicine were issued or renewed between April 1 and September 30, 1992 and who held active licenses on October 1, 1992. This

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[4] The opinion of Justice Tomljanovich, to which Justice Stringer joined, would not affirm the district court's modifications of the 1992 statutory liability to conform it to the instructions of the Legislature in the 1993 Statute.

Court concluded that whatever may have been the Legislature's unarticulated intention, there is no basis based on the terms of the 1992 Statute for giving the statute retroactive application. (A. 3-5.) Accordingly, this Court disagreed with the decision reached by the lower courts that the Plaintiff Class was subject to the surcharge based on the 1992 Statute. If the opinion of Justice Coyne had been a true majority opinion, its mandate would have been reversal with remand to enter declaratory judgment on the 1993 Statute with provision to allow interest to the Plaintiff Class for the wrongful collection of the surcharge in 1992. Under the opinions published by the Court, the Plaintiff Class' victory under the 1992 Statute is not the perfect converse of this Court's later declaration that the State has authority to collect the retroactive tax in 1993.

This Court also, unlike the trial court, concluded that the 1993 Statute does not clarify the 1992 Statute; rather, the 1993 Statute changes the "very nature of the exaction." (A. 6.) This Court concluded that the 1993 Statute, unlike the 1992 Statute, imposes a wholly new tax based on status -- a "provider's tax" -- not a license surcharge. (A. 6-7.) The 1993 Statute, according to this Court, imposes an annual tax on the physician by reason of the physician's status as the holder of a license to practice medicine on or at any time after October 1, 1992, provided the license was issued or renewed on or after April 1, 1992. (A. 6-7.)

By this Court's holding, this Court was not in any respect affirming the lower courts. It reversed. By its conclusion that the 1993 Statute was a stand-alone retroactive new tax, this Court necessarily concluded that the liability being imposed and therefore the results under the two statutes [1992 versus 1993] are not and cannot be the same. As previously stated, the Plaintiff Class consists of those physicians whose licenses were issued or renewed between April 1, 1992 and September 30, 1992 and who were assessed and paid the surcharge under

the 1992 Statute. (A. 19.) This Court, unlike the lower courts, has held that the State could not assess and require payment by the Plaintiff Class under this statute. The 1993 Statute, which was effective May 28, 1993, did not authorize collection of the new provider tax from the Plaintiff Class until December 1993. Thus, under this Court's ruling, the Plaintiff Class should get credit for the unlawful collection in 1992 of a surcharge to which the State was not entitled to collect until 1993. The Plaintiff Class is entitled to, at minimum, one year's interest on the funds improperly collected. Imposing liability under the 1993 Statute required this Court to remand this case to the district court for the purpose of imposing judgment on the State for this interest and allowing those physicians who did not hold an active license on October 1, 1992 to obtain a full refund since they are not subject to this wholly new tax.[5]

More importantly, because this Court has concluded that there are two different statutes which create different liability and therefore lead to different results and ramifications, the concurring minority (J. Tomljanovich and J. Stringer) could not, based on their theory that the 1992 Statute imposes liability on the Plaintiff Class, concur in the judgment reached by Justice Coyne and Chief Justice Keith. A concurrence in judgment requires that the concurring Justices agree with the majority's result but for different reasons. The concurring minority's conclusion that the Plaintiff Class is liable for the surcharge under the 1992 Statute is a disagreement in the "judgment" as well as in the theory. The concurring minority cannot concur in the imposition of liability on the Plaintiff Class under the 1993 Statute on the basis it believes the 1992

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[5] As previously stated, the Plaintiff Class is not limited to those who held active licenses on October 1, 1992. The State has taken the position it only sent out invoices to those physicians who held active licenses on October 1, 1992. If that is not the case, those physicians who paid but did not hold an active license on October 1, 1992 are entitled to a refund.

Statute imposed liability, when five members of the Court (J. Coyne, C.J. Keith, J. Page, J. Anderson and J. Gardebring) conclude the 1992 Statute creates no liability at all. They are, in fact, in dissent.

As reported, the Court's opinion that liability is to be imposed under the 1993 Statute is supported by a two Justice minority (J. Coyne and C.J. Keith) whose ruling is overruled by three Justices (J. Page, J. Anderson and J. Gardebring). The concurring minority (J. Tomljanovich and J. Stringer) makes no comment on the validity of the 1993 Statute and would impose liability under the 1992 Statute, which decision is rejected by five other Justices. In fact, the sum of the two declared "concurring" opinions would be to impose a $400 surcharge on the Plaintiff Class in 1992 and a $400 retroactive new tax in 1993 on some of the Plaintiff Class for a total liability of $800. These are not, by any stretch, "concurring opinions."

As it now stands, two Justices have imposed liability under the 1993 Statute (J. Coyne and C.J. Keith) , two under the 1992 Statute (J. Tomljanovich and J. Stringer), five have ruled the 1992 Statute imposes no liability at all (J. Coyne, C.J. Keith, J. Page, J. Gardebring and J. Anderson) and three have found the 1993 Statute unconstitutional (J. Page, J. Gardebring and J. Anderson). In summary, the majority of the Court is in favor of no liability under the 1992 Statute. The plurality (J. Page, J. Gardebring and J. Anderson) is in favor of no liability under the 1993 Statute. There is no majority in favor of affirmance. The Court cannot assemble a majority by combining two minority factions with wholly antagonistic holdings on both judgment and theory simply because both in some fashion would hold against the Plaintiff Class.

B. <u>The Court Has Either Decided the 1993 Statute Is Unconstitutional as Special Legislation by a Three to Two Plurality or Must Withdraw Its Opinions to Reconsider the Constitutionality Issue.</u>

Further, given the fact that three Justices have found the 1993 Statute unconstitutional, two have not and two are silent, this Court must either revisit the constitutional ramifications of the 1993 Statute or strike it down. Based on the opinion of the Court (J. Coyne and C.J. Keith), the Court has held the following with regard to the 1993 Statute:

- The 1993 Statute created a wholly "new tax" based on physician status -- a provider's tax. (A. 6-8.)

- Retroactive application of this new tax to a single case "smacks of special legislation of the kind prohibited by Article XII, Section 1 of the Minnesota Constitution" and moreover "treads dangerously close to the line separating the power of the judiciary from that of the legislature if it does not in fact cross it." (A. 10.)

- Allowing the State, a party, "to change the substantive law governing disposition of the action in a manner designed to assure an outcome favorable to the state and to make that change applicable retroactively only to the pending action or an action subsequently brought may well violate due process." (A. 10.)

- Despite the fact that it is a wholly new tax whose retroactive application to the Plaintiff Class

> smacks of special legislation and may well violate due process, the Court concludes that the imposition of the medical license surcharge was "one of those rare laws whose retroactive operation serves a benign and legitimate purpose." (A. 11.)

The Court cannot ignore that the United States Supreme Court has held that a "wholly new tax" cannot, in accord with due process, be imposed retroactively even though such a tax would obviously serve the benign and legitimate purpose of raising money. United States v. Carlton, __U.S.__, 114 S.Ct. 2018, 2023 (1994); also see J. O'Connor, concurring, 114 S.Ct. at 2025; United States v. Hemme, 476 U.S. 558, 568 (1986); United States v. Darusmont, 449 U.S. 292, 299 (1981) (per curiam); Untermeyer v. Anderson, 276 U.S. 440 (1928) and Blodgett v. Holden, 275 U.S. 142, 147 (1927). See also, Furlong v. Commissioner of Internal Revenue, 36 F.3d 25, 27 (7th Cir. 1994); Tate & Lyle, Inc. v. Commissioner of Internal Revenue, 103 T.C. 656 (U.S. Tax Court 1994).

After all, one can assume that most, if not all, taxes imposed by a legislature in a democratic republic like Minnesota and all other United States jurisdictions serve a benign and legitimate purpose. Although the United States Supreme Court has upheld retroactive tax statutes against a due process challenge where it involves retroactively changing the rate of tax to which the transaction is subject or the availability of a deduction for engaging in that transaction, the United States Supreme Court has never allowed what it concludes to be a wholly new tax to be imposed retroactively. The two justice minority opinion of the Court in this case is the only recorded example found by the Plaintiff Class where a statute which otherwise would be declared unconstitutional (i.e., smacking of special legislation and "may well violate due

process") is ultimately validated solely by the Legislature's "benign and legitimate" purpose.[6]

The last time the United States Supreme Court spoke on the constitutionality of a wholly new tax was in United States v. Carlton, __U.S.__, 114 S.Ct. 2018 (1994) in which the United States Supreme Court recognized that the authority of Blodgett v. Holden, 275 U.S. 142 (1927) and Untermeyer v. Anderson, 276 U.S. 440 (1928) (which involved the nation's first gift tax) survives to those situations involving "the creation of a wholly new tax." In Carlton, which did not involve a wholly new tax, the United States Supreme Court concluded that the retroactive imposition there was neither illegitimate nor arbitrary and Congress had acted promptly in establishing a modest period of retroactivity. 114 S.Ct. at 2022.

Justice O'Connor, in her concurring opinion, emphasized that what was being asserted in Carlton would not apply where a wholly new tax was being imposed retroactively. She stated:

> But "the Court has never intimated that Congress possesses unlimited power to readjust rights and burdens . . . . and upset otherwise settled expectations." Connolly v. Pension Benefit Guaranty Co., 475 U.S. 211, 229, 106 S.Ct. 1018, 1028, 89 L.Ed.2d 166 (1986) (concurring opinion) (brackets omitted), citing Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16, 96 S.Ct. 2882, 2893, 49 L.Ed.2d 752 (1976). The governmental interest in revising the tax

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[6] The finding of a "benign and legitimate" purpose is internally contradicted by the Court's observation that the 1993 Statute was "characterized" by the Legislature as "clarifying" the 1992 Statute, a purpose which the Court declares is outside its role -- "the 1993 legislature is not the interpreter of laws enacted by a prior legislature." (A. 6.)

> laws must at some point give way to the taxpayers' interest in finality and repose. For example, a "wholly new tax" cannot be imposed retroactively, United States v. Hemme, 476 U.S. 558, 568, 106 S.Ct. 2071, 2077-2078, 90 L.Ed.2d 538 (1986), even though such a tax would surely serve to raise money. Because tax consequences of commercial transactions are relevant, and sometimes dispositive, consideration of a taxpayer's decisions regarding the use of his capital, it is arbitrary to tax transactions that were not subject to taxation at the time the taxpayer entered into them. See Welch v. Henry, supra, 305 U.S. at 147, 59 S.Ct. at 125-126.

Id. at 2025.

This Court never considered that although the "retroactive operation serves a benign and legitimate purpose" of government it may nonetheless be arbitrary and irrational (and therefore a violation of due process) to impose on the Plaintiff Class a duty to pay a wholly new provider or status tax based on a status acquired long before the Legislature enacted such a tax. By this Court's own ruling, there is no question that the physician who was issued his license between April 1 and September 30, 1992 could not have anticipated that at the time the transaction was completed he would owe a provider tax effective in May 1993, based on that transaction. Some physicians, especially those who are retired or who practice outside the State of Minnesota but nonetheless hold a license in Minnesota, may have altered their behavior if they had known of the tax by refusing to renew their licenses and therefore avoid the tax. The retroactive taxation of a voluntary transaction that was not subject to taxation at the time it was accomplished is arbitrary and thus a violation of due process.

This Court, by its construction of the 1993 Statute, has placed this case directly in line with the United States Supreme Court cases involving the imposition of a wholly new tax. In Blodgett and Untermeyer, Congress had enacted an entirely new gift tax which it attempted to apply retroactively to gifts which were made and completely vested before the enactment of the taxing statute. Blodgett, 275 US. at 147; Untermeyer, 276 U.S. at 445-446. The arbitrariness of taxing transactions that were not subject to taxation at the time the taxpayer entered into them rendered the retroactive operation a violation of due process. Untermeyer, 276 U.S. at 445-446. That same arbitrariness obviously exists here, which this Court simply does not address.

It should be noted that in Welch v. Henry, 305 U.S. 134 (1938), a case cited by this Court, the challenged revenue act retroactively imposed a tax on certain dividend income that had formerly been excluded from taxation. While holding the retroactive taxation constitutional under the facts of that case, the Supreme Court stated that a different case would be presented where a transaction was taxed that was "completely vested before the enactment of the taxing statute, and "the nature or amount of the tax could not reasonably have been anticipated by the taxpayer at the time of die particular voluntary act which the statute later made the taxable event." Id. at 147. Here, the transaction that was taxed -- issuance of the license -- was completely vested before the enactment of the taxing statute and neither the nature nor amount of the tax could have reasonably been anticipated by the taxpayer at the time of the license renewal or issuance, which the statute later made the taxable event.

Furthermore, in every case (regardless of whether it involved a wholly new tax) in which the United States Supreme Court has upheld a retroactive federal tax statute against due process challenge, the law applied retroactively for only a relatively short period prior to enactment. See United

States v. Hemme, 476 U.S. at 562 (one month); United States v. Darusmont, 449 U.S. at 294-295 (10 months) and United States v. Hudson, 299 U.S. 498 (1937) (one month). In Welch v. Henry, 305 U.S. 134 (1938), the tax was enacted in 1935 to reach transactions completed in 1933; but the United States Supreme Court emphasized that the Wisconsin State Legislature met only biannually and it made the revision "at the first opportunity after the tax year in which the income was received." 305 U.S. at 151. The effective date of the 1993 Statute was May 28, 1993, by which the Legislature seeks to collect a new tax on transactions completed between April 1, 1992 and September 30, 1992. Accordingly, for some members of the Plaintiff Class, there is a period of retroactivity of over one year.

III. THE OPINIONS WHOLLY OMIT DISCUSSION OF THE EQUAL PROTECTION ISSUE WHICH OBVIOUSLY ATTENDS A RETROACTIVE PROVIDER TAX IMPOSED ON ONLY ONE-HALF OF THE PLAINTIFF CLASS.

Finally, the Court never addresses the equal protection challenge raised by the Plaintiff Class to this new tax. This Court has concluded that the 1993 provider tax was enacted to meet the requirements of the 1991 federal enactment that states with fiscal years beginning on July 1 comply with the new law by October 1. (A. 9.) The Court never addresses how this would justify, under an equal protection analysis, application of the 1993 Statute to retroactively tax, on the basis of status alone, only physicians who happened to have their licenses come up for renewal between April 1 and September 30, 1992 [renewal is determined by birth date] or who were initially licensed during this period and held an active license on October 1, 1992.

Even if a retroactive provider tax is justifiable on due process grounds, how can it be that the Legislature may arbitrarily select approximately one-half of the State's physician census on the basis, primarily, of birth date to pay the tax and excuse the rest of the physicians in the same provider class from any tax liability? After all, the same amount of money necessary to satisfy the Legislature's fiscal objective would have been raised by levying a tax of $200 on all physicians who held an active license on October 1, 1992. What possible justification can exist for satisfying the entire October 1, 1992 fiscal objective by a retroactive tax on one-half of the physicians and excusing completely the other MD. The concurring opinion implies that the unequal retroactive treatment of the Plaintiff Class may be justified because the tax is equally applied to all physicians after its effective date. This startling analysis with its considerable ramifications should be addressed by the Court.

CONCLUSION

The Plaintiff Class has no illusions about the long odds which attend petitions for rehearing. Nevertheless, it is respectfully submitted that the Court has made serious errors in the counting of its majority and in the identification of which opinion should be the Court's opinion. The subject matter of this case is of critical political and constitutional import. The Court's opinion, in its present state, throws into chaos any reliable appreciation of the current law on retroactivity, due process, legislative "clarification" of prior enactments and equal protection. The opinions, as issued, will promote far more in the way of law review discussions on how to count appellate majorities in future litigation am it will promote resolution of the issues they purport to address.

Given the serious ramifications this case presents, The Plaintiff Class respectfully quest that the Court grant the

petition for rehearing. If the opinions remain unrevised, a of reversal should be issued in Justice Page's opinion which becomes the opinion of Court. If the issues of due process and equal protection raised by sole application of the 1993 Statute as a retroactive tax are to be readdressed, reargument and limited rebriefing is requested.

Dated: May 20, 1996

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